

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

L.C. CASE NO.: 2014-CA-2460
DCA CASE NO.: 2D23-2211

ADAM J. SOUDERS,

Appellant/Cross-Appellee,

vs.

SUAREZ TRUCKING FL CORP.,

Appellee/Cross-Appellant.

**APPELLEE/CROSS-APPELLANT'S
ANSWER BRIEF AND CROSS-INITIAL BRIEF**

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INTRODUCTION

This case concerns whether a settlement agreement between the parties was breached. The Florida Supreme Court determined that Appellee/Cross-Appellant, Suarez Trucking FL Corp. (“Suarez Trucking”), and its Co-Defendant Ynefre Fernandez Tomas (“Tomas”), accepted a proposal for settlement made by Appellant/Cross-Appellee, Adam Souders (“Souders”), thereby forming a legally binding contract.

On remand, the trial court was asked to determine whether Suarez Trucking breached the contract by tendering a settlement check that included Souders, his attorney, and a workers’ compensation lienholder as a named payee on the check. The trial court correctly determined that no material breach occurred and that Souders was not relieved of his contractual obligation to dismiss his claims brought against the defendants. Suarez Trucking did not materially breach any essential term of the contract. It further substantially complied with the contract by timely offering to reissue the settlement check with the lien holder removed.

On cross-appeal, Suarez Trucking asserts that the trial court erred in finding that inclusion of the lienholder, Guarantee Insurance Company (“Guarantee”), on the settlement check constituted any breach of the terms of the agreement, much less a material breach. The trial court further erred

in denying Suarez Trucking's motions to limit Souders's damages to prevent Souders from receiving double recovery of the settlement amount agreed to under the contract. It abused its discretion by prohibiting Suarez Trucking from amending its Answer to assert a counterclaim against Souders for breaching his obligations under the settlement agreement.

This Court should reverse and remand with instructions for the trial court to vacate its prior ruling and enter an order (1) finding Suarez Trucking did not breach the settlement agreement, and (2) limiting any damages awarded to Souders to, at most, prejudgment interest from the date the settlement agreement was formed to the date Suarez Trucking offered to reissue the settlement check.

STATEMENT OF THE CASE AND FACTS

I. FEBRUARY 20, 2014 ACCIDENT; LAWSUIT; SETTLEMENT OFFER AND ACCEPTANCE; DENIAL OF ENFORCEMENT; AND TRIAL.

This case arises out of an automobile accident on February 20, 2014, in Hillsborough County. (R. 32–39).¹ Souders was operating a vehicle that collided with a dump truck operated by Tomas and owned by Suarez Trucking. (R. 32–39). Fourteen days after the accident, Souders sued Tomas and Suarez Trucking. (R. 32–39; 446–50).

¹ The trial court record on appeal will be referred to as “R.”, followed by the corresponding page number.

Soon thereafter, Guarantee filed its notice of a workers' compensation lien. (R. 48). The lien stated,

As grounds for said lien, the undersigned asserts that medical and indemnification Workers' Compensation benefits have been paid to the Plaintiff by the Guarantee and/or their administrators pursuant to Chapter 440, Florida Statutes. These benefits have been paid as a result of the incident that is the subject of this action which occurred when the Plaintiff was in the course and scope of employment.

WHEREFORE, the undersigned files this Workers' Compensation Lien against any settlement, judgment, or verdict secured by the Plaintiff in this action.

(R. 48).

On February 25, 2015, Souders served three proposals for settlement: 1) to Tomas only (R. 234); 2) to Suarez Trucking only (R. 235); and 3) to Tomas and Suarez Trucking (R. 237). The third proposal—which is relevant to this appeal—states as follows:

- A. NAME OF PARTY MAKING THE PROPOSAL: ADAM J. SOUDERS
- B. NAME OF PARTY TO WHOM THE PROPOSAL IS BEING MADE: Defendant, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL. CORP.
- C. CLAIMS TO BE RESOLVED: All claims ADAM J. SOUDERS, has brought against Defendants, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL CORP., as set forth in the above captioned complaint. The proposal resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served, subject to subdivision (F) of Florida

Rules of Civil Procedure 1.442 for any and all claims made by ADAM J. SOUDERS as alleged in the Complaint against Defendants, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL CORP.

- D. AMOUNT OF THE PROPOSAL: The Defendants, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL CORP., only, shall pay \$500,000 to the Plaintiff, ADAM J. SOUDERS, within ten (10) days from the date of the acceptance. This claim is inclusive of all attorney's fees and costs and is made to settle all claims that ADAM J. SOUDERS, has against Defendant, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL CORP.

- E. CONDITIONS: Upon acceptance of the Proposal for Settlement, Plaintiff, ADAM J. SOUDERS, will enter a dismissal with prejudice against Defendants, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL. CORP. This Proposal for Settlement is not to be considered a demand to be aggregated with any other demand that may be made in conjunction with this demand.

- F. AMOUNT OF PUNITIVE DAMAGES: Not applicable. Plaintiff has not, at this time, claimed punitive damages.

- G. ATTORNEY'S FEES: The Plaintiff's proposal includes attorney's fees whether those attorney's fees are incurred through request for admissions or otherwise. Attorney's fees are not part of the legal claim absent denials of request for admissions or as other sanctions by the court.

(R. 248–249).

Tomas and Suarez Trucking timely filed a joint “notice of acceptance” of the third proposal on March 26, 2015. (R. 239–240). The joint notice stated, in pertinent part:

Defendants YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL CORP . . . pursuant to Florida Statutes 768.89 [sic] and Florida Rule 1.442, gives notice that Defendants accept Plaintiff's Proposal for Settlement made to Defendants, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL CORP. dated February 25, 2015 in the above-referenced matter."

(R. 239).

A settlement check in the amount of \$500,000 made payable to Souders, his attorney's trust account, and the workers' compensation lien carrier, Guarantee, was timely sent to Souders's counsel. (R. 242).

Souders's counsel subsequently wrote to Tomas's and Suarez Trucking's counsel. (R. 243, 253). He asserted that because the settlement check included the workers' compensation lienholder as a payee, it did not comply with the proposal for settlement. (R. 243, 253). As a result, Souders claimed that Tomas and Suarez Trucking did not timely accept the proposal for settlement and that the parties would proceed to trial. (R. 243, 253).

In response, Tomas's and Suarez Trucking's counsel proposed to have the check reissued and made payable only to Souders. (R. 243, 254). However, Souders rejected this suggestion and advised that he was "no longer interested in resolving this case" (R. 243, 255).

Tomas and Suarez Trucking moved to enforce the settlement. (R. 241–255). They maintained that the proposal for settlement did not specify how the check was to be made payable and inclusion of the workers’ compensation lienholder does not preclude settlement. (R. 241–245). Souders sought summary judgment on the issue and claimed that the inclusion of the lienholder on the settlement check constituted a rejection and counteroffer. (R. 271–280).

The trial court heard arguments from the parties. (R. 1140–1166). Tomas and Suarez Trucking maintained that a contract was entered into as there was an offer (i.e. the proposal for settlement) and an acceptance (i.e. notice of acceptance). (R. 1143). The issue concerning how the check was made payable goes to whether that contract was breached—not whether a contract was formed in the first instance. (R. 1145).

Souders contended there was no contract and that filing a notice of acceptance is insufficient to form one. (R. 1146, 1154). Instead, the check constituted a counteroffer and rejection of the offer. (R. 1149, 1151). Souders claimed that Suarez Trucking and Tomas “violated a material and essential term” (R. 1154). While conceding there is a valid workers’ compensation lien, Souders argued that the carrier was not a party to the lawsuit and the lien was not a specific term in the offer. (R. 1148).

Suarez Trucking and Tomas countered that the rule only requires a party to file a written acceptance within 30 days, and therefore, a contract was formed. (R. 1158). They further argued that the check was sufficient. (R. 1159). The offer did not specify how it was to be made payable. (R. 1164–1165). However, if the trial court found that the check was not sufficient, then the remedy is not to set aside the settlement agreement—the remedy is to enforce that settlement. (R. 1159–1160). The check only goes to whether or not that contract was breached. (R. 1161).

The trial court denied the motion to enforce settlement. (R. 322; 1162–1163). It found there was a counteroffer and a rejection. (R. 1164). It stated that the acceptance was null and void when the check included a third party not authorized by the plaintiff. (R. 1163–1164).

Souders subsequently settled his claims against Tomas. (R. 695; 1120). The case proceeded to jury trial against Suarez Trucking. (R. 1131–1133). The parties stipulated to past medical expenses of \$476,607.18 and past lost wages of \$46,000. (R. 1132). The jury found Souders 4% negligent and Tomas 96% negligent. (R. 1131). It awarded past and future pain and suffering of \$500,000 and \$1,460,000, respectively. (R. 1132).

A final judgment in the amount of \$1,883,302.89 was entered against Suarez Trucking. (R. 1131–1133). The trial court also ruled that Souders is entitled to attorney’s fees and costs pursuant to the proposal for settlement served only upon Suarez Trucking. (R. 1022–1023; 1030). Suarez Trucking appealed to this Court. (R. 1134–1135; 1168–1169).

II. THE PRIOR APPELLATE PROCEEDINGS CONCERNING THE SETTLEMENT AGREEMENT.

Suarez Trucking appealed the trial court’s order denying enforcement of the settlement agreement. (R. 1134). In a split decision, this Court affirmed the trial court’s ruling concluding that Suarez Trucking never accepted the material terms of the proposal for settlement. See Suarez Trucking FL Corp. v Souders, 311 So. 3d. 263, 265–272 (Fla. 2d DCA 2020) (“Suarez Trucking I”). The majority opinion held that Suarez Trucking’s notice of acceptance “lacked the specificity necessary to create a binding contract.” Id. at 269. The majority further determined that the proposal required Suarez Trucking to issue the check only to Souders. Id. at 270–271. By including the workers’ compensation lienholder, the majority found Suarez Trucking materially altered the essential terms of the proposal. Id. at 270–272.

The dissent explained that the majority opinion conflated the issues of acceptance and performance. Id. at 272–76 (Atkinson, J., dissenting). It

argued a binding contract was formed when Suarez Trucking accepted the proposal for settlement in writing. Id. at 272–76. In the dissent’s view, the notice of acceptance was unqualified and did not include any additional terms or an alteration of terms. Id. at 275–76.

Suarez Trucking subsequently sought review in the Florida Supreme Court. See Suarez Trucking FL Corp. v Souders, 350 So. 3d. 38 (Fla. 2022) (“Suarez Trucking II”). The Florida Supreme Court reversed this Court’s decision, holding that the filing of Suarez Trucking’s Notice of Acceptance of Plaintiff’s Proposal for Settlement created a binding settlement contract where the accepting party fully assented to the terms of the offer. Id. at 40.

However, the Florida Supreme Court did not address the issues related to breach and remedy, explaining:

We decline to go beyond the conflict issue to address whether Suarez Trucking—by tendering the settlement check to Souders with the workers’ compensation lienor named as a payee—breached the settlement agreement. Because of their focus on the issue of contract formation, the parties have never fully argued issues related to breach and remedy. Those issues should be resolved on remand, uninfluenced by the erroneous view of contract formation adopted by the Second District.

Id. at 41.

In a concurring opinion, Justice Canady, joined by Justice Polston, addressed the impact of the worker's compensation lien on the issue of breach. Justice Canady began by stating:

Although I do not dissent from the majority's conclusion that fuller briefing of the issues related to breach and remedy is appropriate, based on what has been presented thus far by the parties it appears doubtful to me that any breach of the settlement agreement occurred. And it must be acknowledged that the resolution of the breach issue has serious implications for the integrity of the legal framework for the protection of statutory workers' compensation liens.

Id. at 44–45 (Canady, J., concurring).

Justice Canady then discussed the application of section 440.39, Florida Statutes, to the rights and duties of the settling parties, further explaining:

As Souders admits, the parties here were subject to the provisions of section 440.39. Souders was required by law to bring his third-party tort claim not only for his own benefit, but also for “the use and benefit” of the workers' compensation carrier. He was not entitled to the disbursement of funds paid in settlement of his claim prior to an agreed or judicially determined resolution of the workers' compensation lien. The settlement funds provided to Souders indisputably were legally encumbered by the lien.

Id. at 47.

Following the Florida Supreme Court's decision and mandate, this Court subsequently remanded the case back to the trial court to determine the issues related to breach and remedy. (R. 1211–1239).

III. PROCEEDINGS IN THE TRIAL COURT ON REMAND.

A. Souders's Motion to Resolve the Issue of Breach and for Reinstatement of the Final Judgment.

Upon returning to the trial court, Souders filed a Motion to Resolve the Issue of Breach and for Reinstatement of the Final Judgment in his favor. (R. 1240–1262). Suarez Trucking responded to that motion (R. 1263–1282), and Souders replied (R. 1283-1287).

Souders argued that the settlement agreement formed by Suarez Trucking's acceptance of the February 25, 2015 proposal for settlement explicitly and unambiguously specified that payment was to be made only to "Plaintiff, ADAM J. SOUDERS." (R. 1240–1262). By instead making the settlement check payable to both Souders and Guarantee, Souders argued that Suarez Trucking failed to timely pay the \$500,000 settlement amount and materially breached the essential payment terms of the agreement. (R. 1240–1262). As a result of this alleged material breach, Souders argued he was relieved of his obligation under the agreement to dismiss all claims brought against Suarez Trucking. (R. 1240–1262). He requested the trial court reinstate the Final Judgment entered in his favor following the January 2019 jury trial. (R. 1240–1262).

In Response, Suarez Trucking argued that it did not breach the terms of the settlement agreement when it timely tendered the initial settlement

check to Souders. (R. 1263–1282). Because it was undisputed that Guarantee had a valid lien on the settlement funds, Suarez Trucking was necessarily required to include the lienholder on the settlement check. (R. 1263–1282).

Suarez Trucking further argued that if there was determined to be any breach of the agreement, such breach was not material. (R. 1263–1282). First, even if the settlement check was made payable solely to Souders, he could not accept the proceeds of the settlement check until the amount of the worker's compensation lien was agreed to by the parties or determined by the trial court. (R. 1263–1282). In any event, Suarez Trucking further substantially complied with the terms of the contract by offering to reissue the settlement check and remove Guarantee as a co-payee just one day after Suarez Trucking received notice from Souders's counsel of his refusal to accept the original check. (R. 1263–1282). Had Souders agreed to the check being reissued, any brief delay in Souders's ability to receive the funds would not have produced any hardship to Souders. (R. 1263–1282).

Accordingly, Suarez Trucking maintained Souders's motion should be denied because no breach occurred, but even if there was a breach, it was not material. (R. 1263–1282).

In reply, Souders further argued nothing in section 440.39, Florida Statutes required Suarez Trucking to include Guarantee on the settlement check. (R. 1283–1287).

B. Trial Court’s Ruling on the Issue of Breach.

A hearing on Souders’s Motion to Resolve the Issue of Breach and for Reinstatement of the Final Judgment occurred on June 19, 2023. (R. 1388–1443).

At the conclusion of the hearing, the trial court articulated its ruling concerning whether Suarez Trucking’s inclusion of Guarantee on the initial settlement check constituted a breach of the agreement, and if so, whether such breach was material. (R. 1430–1432).

The Court does find that it constitutes a breach only from the standpoint of there was no specific discussion with reference to how the check would be made out, other than the check should be made out to the plaintiff; and therefore, it wasn’t exactly as was requested. So that was a change in the Proposal for Settlement.

However, the Court does not find that that breach was material, because why would a defendant not include a lien that both parties were fully aware in existence, the plaintiff, by its own admission, recognizing an obligation to satisfy that lien and indicating that it intended to satisfy that lien. Why wouldn’t the defendant protect itself and include the lienholder on the check. Again, the plaintiff acknowledged the intention to satisfy that lien.

So no specific amount or hindrance was caused by the defendant including the lienholder because it left open the

ability to negotiate the amount of the lien without delaying the receipt of payment by the plaintiff.

The plaintiff still had the ability to continue the negotiation. The proposal for a settlement did not include a statement that time is of the essence. So, therefore, even if the plaintiff had raised the objection, or when the objection was made, the defendant offered to reissue the check, which could have still arguably been timely.

So based on the self-acknowledged obligation of the plaintiff to satisfy the workers' comp lien, this Court finds that inclusion of that workers' comp lienholder on the check did not constitute a material breach; and therefore, the payment or the tendering of payment of the \$500,000 check constituted satisfaction of the Proposal for Settlement.

(R. 1430–1432).

A written order further articulating the ruling on Souders's motion was entered by the trial court on September 15, 2023, and stated:

- a) The Defendant's inclusion of the worker's compensation carrier on the settlement check constituted a breach of the terms of the settlement contract;
- b) The Court rules, however, that this breach was not a material breach because no specific amount of hindrance was caused by the Defendant including the worker's compensation carrier on the settlement check and the Defendant offered to timely reissue a new check without including the worker's compensation carrier. As a result, Plaintiff's Motion to Resolve Issue of Breach and Reinstatement of the Final Judgment Nunc Pro Tunc, is hereby denied[.]

(R. 1454–1456).

C. Suarez Trucking's Motion to Limit Damages.

In its Motion to Limit Damages, Suarez Trucking argued that Souders already received all of the damages to which he is entitled by accepting payment of \$500,000 from Co-Defendant Tomas. (R. 1365–1368). It explained that Souders was improperly seeking to be paid twice for the same damages caused by Tomas: (1) \$500,000.00 already paid by Tomas and (2) \$500,000 to be paid by Suarez Trucking, for a total of \$1,000,000. (R. 1365–1368). Thus, Suarez Trucking requested Souders's damages be limited to the pre-judgment interest from the date the Proposal was accepted until the day that the offer was made to reissue the check—March 26, 2014 to April 24, 2014, for a total of 29 days. (R. 1367–1368).

Souders responded that the \$500,000 paid by Tomas stemmed from a separate and distinct settlement agreement formed following a June 19, 2017 settlement offer sent only to Tomas. (R. 1447–1449). This offer required Souders to enter a voluntary dismissal with prejudice against Tomas, only, if Souders was paid \$500,000.00 within seven (7) days from the date of the offer. (R. 1447–1449). Tomas accepted the offer by timely delivering a letter of acceptance accompanied by a check made payable to Souders for \$500,000. (R. 1447–1449). Because the defendants were presented with two separate valid settlement agreements at separate

times, and both agreements were accepted, Souders argued that both settlements must now be satisfied.

D. Suarez Trucking's Motion for Leave to Amend.

In addition to its Motion to Limit Damages, Suarez Trucking also moved for leave to amend its Answer and assert counterclaims against Souders. (R. 1288–1289). These included two actions for breach of contract against Souders seeking (1) specific performance of the settlement agreement given Souders's breach for wrongfully refusing to accept the settlement check Tomas and Suarez Trucking offered to reissue; and (2) dismissal of the action without payment of any additional monies or, alternatively, disgorgement of the \$500,000 already paid by Tomas with a new check in the amount of \$500,000 to be issued on behalf of Tomas and Suarez Trucking to prevent Souders from being unjustly enriched. (R. 1295–1296).

Souders responded that the trial court lacked authority to deviate from the prior appellate mandate and could not take any action—such as allowing Suarez Trucking leave to amend its Answer to bring counterclaims—other than to compose an order carrying out the terms of the mandate. (R. 1444–1445).

E. Trial Court's Rulings on the Issue of Remedies.

The trial court heard Suarez Trucking's (1) Motion to Limit Damages and (2) Motion for Leave to Amend on August 31, 2023. (R. 1720–1781).

As to the former, the trial court articulated its ruling as follows:

Once again, at this point the Court does find that there was a breach of the settlement agreement, the proposal for settlement, which was a valid acceptance. There was a breach by including the name of the workers' comp carrier on the check. However, the Court finds that that breach was not a material breach, and therefore the proposal for settlement should be enforced.

Also, the Court does find that as a result of this Court's denial of a request by the defense to enforce the proposal for settlement, an opportunity [sic] for the plaintiff to be unjustly enriched.

However, the Court does not find that it has the authority to grant a setoff based upon a subsequent offer and acceptance to one of the parties in the litigation that did not mirror the same offer that was the subject of the proposal for settlement.

(R. 1770–1771).

The trial court denied the motion for leave to amend on a similar ground: based on a lack of authority to grant leave to amend the pleadings following the finding that the proposal for settlement was accepted, which required dismissal of both parties. (R. 1772–1773).

In the trial court's September 15, 2023 written order, the court further set forth its rulings on Suarez Trucking's Motion to Limit Damages and Motion for Leaving to Amend, as follows:

- c) The Court denies the Defendant's Motion to Limit Damages and finds that pursuant to the enforceable terms under SOUDERS' Proposal for Settlement, SUAREZ must pay SOUDERS \$500,000.00 and SOUDERS must dismiss all claims made against SUAREZ. The Court does not have authority to grant setoff in favor of SUAREZ for payment made under a separate settlement agreement with different terms and different parties made between SOUDERS and YNEFRE FERNANDEZ TOMAS on June 23, 2017;
- d) Because the Court finds there to have been a binding settlement agreement, the Defendant must pay the Plaintiff \$500,000.00 in accordance with the enforceable settlement agreement, plus interest at the rate of 4.75% to be applied from April 5, 2015, the 10th day from the date Defendant filed its Notice of Acceptance on March 26, 2015;
- e) The Defendant's Motion for Leave to Amend the Complaint is hereby denied[.]

(R. 1454–1456).

F. Motions for Rehearing, Appeal, and Cross-Appeal.

Souders moved for rehearing of the Court's September 15, 2023 Order, and Suarez Trucking responded. (R. 1299–1302, 1304–1308). Souders subsequently filed an amended motion for rehearing, which was substantially identical to his prior motion and sought rehearing of the trial court's finding that Suarez Trucking did not materially breach the settlement. (R. 1457–1460). Suarez Trucking also moved for rehearing of the trial court's September 15th Order denying the motions to limit damages and to amend the Answer. (R. 1461–1469).

On October 11, 2023, while the motions for rehearing remained pending, Souders noticed an appeal of the trial court's September 15, 2023 order denying his motion to resolve the issue of breach and reinstate the vacated final judgment previously entered in his favor. (R. 1471). This Court held the appeal in abeyance during the pendency of the motion for rehearing.

Following a hearing on the motions, the trial court entered a subsequent order denying both requests for rehearing. (R. 1666–1719, 1795). Suarez Trucking filed its cross-appeal of the rulings in the September 15, 2023 order. (R.1782). This Court lifted the abeyance and ordered the appeal to progress.

ANSWER BRIEF

SUMMARY OF ARGUMENT

The trial court correctly found that Suarez Trucking did not materially breach the contract by including the workers' compensation lienholder as a payee on the settlement check. Where the proposal for settlement was silent as to how the settlement check should be made payable, who is included as a payee is not an essential term.

Suarez Trucking's actions were not only proper, they were mandated by law. It is undisputed that Guarantee had a valid lien on the settlement

funds. As a result, Suarez Trucking had a duty, pursuant to section 440.39, Florida Statutes, to include the carrier on the settlement check. Because it had notice of the lien, if Suarez Trucking failed to protect the lien by including Guarantee on the check, it could have faced a cause of action for impairment of lien or subrogation. Given Souders's further refusal to affirm the lien would be satisfied, Suarez Trucking necessarily included the lienholder on the check to protect all interests.

Notably, even if he had been the sole payee on the check, Souders was statutorily prohibited from accessing the settlement funds until he reached an agreement with the carrier on the amount of the lien, or the amount was determined by the court. Souders's ability to negotiate or litigate the value of the lien was in no way hindered by Suarez Trucking.

In any event, Suarez Trucking further substantially complied with the terms of the contract by offering to reissue the settlement check and remove Guarantee as a co-payee just one day after receiving notice of Souders's refusal to accept the original check. As the trial court correctly found, the proposal for settlement contained no express stipulation that time was of the essence. Had Souders not wrongfully refused to accept the reissued check, any brief delay in Souders's ability to receive the funds would not have produced any hardship.

Accordingly, this Court should affirm the trial court's decision to enforce the settlement agreement based on its finding that Suarez Trucking did not materially breach any essential terms of the contract.

STANDARD OF REVIEW

“The interpretation of a contract is a question of law to be decided by a court.” McPhee v. The Paul Revere Life Ins. Co., 883 So. 2d 364, 367 (Fla. 4th DCA 2004); Kumar v. Patel, 227 So. 3d 557, 558 (Fla. 2017) (“Questions of statutory interpretation are reviewed de novo.”); Sanders v. State, 35 So. 3d 864, 868 (Fla. 2010) (“Pure questions of law are subject to de novo review.”); Renny v. Bertoloti, 252 So. 3d 761, 765 (Fla. 4th DCA 2018) (“Likewise, we review the interpretation of the settlement agreement de novo.”).

However, “[t]he issue of whether an alleged breach is vital or material is reviewed as a question of fact.” Eclectic Synergy, LLC v. Seredin, 347 So. 3d 27, 29 (Fla. 4th DCA 2022) (quoting Covelli Family, L.P. v. ABG5, L.L.C., 977 So. 2d 749, 752 (Fla. 4th DCA 2008)).

Souders's Initial Brief misstates the standard of review as being purely “de novo” in this case. Souders cites to the decision in Mortellaro v. Caribe Health Centre, Inc., 322 So. 3d 128 (Fla. 2d DCA 2021), where this Court explained that appellate courts “review de novo [a] trial court's

interpretation of the parties' settlement agreement." Id. at 132 (emphasis added). Indeed, review of a lower court's "interpretation" of what contractual duties and essential terms are enforceable in contract is as an issue of law. But analysis of whether a party's actions amounted to a material breach of those essential terms is an issue of fact.

When addressing whether the parties materially breached the contract in Mortellaro, this Court explained that the lower court's finding of no material breach was error because it "finds no support in the undisputed facts." Id. at 132. See also JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co., 292 So. 3d 500, 509 (Fla. 2d DCA 2020) (noting that "review of [a] trial courts *construction* of a contract is de novo" but later explaining that "[t]o determine whether the conduct rose to the level of a 'material breach,' we must look to the language of the contract *and* measure the breaching party's shortfall or failure in performance).

A trial court's factual findings must be supported by competent, substantial evidence. Id. See also Moore v. Chodorow, 925 So. 2d 457, 461 (Fla. 4th DCA 2006) ("Whether a party's failure to commit certain actions constitutes a material breach of an agreement is reviewed as a question of fact.").

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND SUAREZ TRUCKING DID NOT MATERIALLY BREACH THE CONTRACT

The trial court correctly found that Suarez Trucking's inclusion of that workers' compensation lienholder on the settlement check did not constitute a material breach of the contract that would have otherwise excused Souders's failure to perform thereunder.

A. **This Court Should Reject Souders's Interpretation of The Proposal for Settlement.**

As discussed above, the pertinent terms of the settlement agreement were as follows:

D. AMOUNT OF THE PROPOSAL: The Defendants, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL CORP., only, shall pay \$500,000 to the Plaintiff, ADAM J. SOUDERS, within ten (10) days from the date of the acceptance. This claim is inclusive of all attorney's fees and costs and is made to settle all claims that ADAM J. SOUDERS, has against Defendant, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL CORP.

E. CONDITIONS: Upon acceptance of the Proposal for Settlement, Plaintiff, ADAM J. SOUDERS, will enter a dismissal with prejudice against Defendants, YNEFRE FERNANDEZ TOMAS and SUAREZ TRUCKING FL. CORP. This Proposal for Settlement is not to be considered a demand to be aggregated with any other demand that may be made in conjunction with this demand.

(R. 248–249).

Souders heavily focuses on the isolated words “pay to Plaintiff,” and claims that this meant how the check should be made payable. Indeed, in his brief he even supplies the words “check made payable.” (Initial Br. at 13). However, to reach this conclusion, the proposal for settlement would have to be construed against Suarez Trucking, be read in the most literal sense, and additional words would need to be inserted into the proposal. Souders’s interpretation is unreasonable and contrary to several well-established principles.

For instance, the plain and ordinary meaning—not a literal meaning—of terms should apply. As Justice Scalia explained, a “good textualist is not a literalist.” Antonin Scalia, A Matter of Interpretation 24 (1997). Words must be read in the context in which they are used. See Advis. Op. to the Gov. Re: Implementation of Amendment 4, The Voting Rest. Amendment, 288 So. 3d 1070, 1078 (Fla. 2020) (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012)); John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392–93 (June 2003) (“This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.”).

Read in context, the proposal for settlement does not state how the check should be made payable. There are no words specifying how to make the check payable. It simply states, “pay to,” and that is exactly what Suarez Trucking did here. It paid \$500,000 and sent a check to Souders. If Souders wanted the check to be made payable in a certain manner, he should have expressly stated so.

Likewise, courts may not add terms to a contract. Int’l Expositions, Inc. v. Miami Beach, 274 So. 2d 29, 30–31 (Fla. 3d DCA 1973). To accept Souders interpretation, this Court would need to add the word “only” to the proposal. Or, like Souders did in his brief, it would need to add the words ‘make payable to.’ (Initial Br. at 13). Notably, accepting Souders’s interpretation would further mean that even the inclusion of his attorney’s name on the check was not consistent with his proposal—which would be contrary to the traditional and well-accepted way that settlement checks in this state are made payable.

Notwithstanding Souders’s erroneous interpretation, there was nothing in the proposal specifying how the check would be issued. It is unreasonable to claim that inclusion of any other party—including his attorney’s trust account—did not comply. When the proposal is read in context and in light of well-established legal customs of issuing checks,

Suarez Trucking acted reasonably and performed its contractual duties. A plain reading of the contract also reflects that Suarez did nothing to breach the contract. Suarez Trucking's complete adherence to the contract—and the lack of any breach on its behalf—is the subject of, and discussed further in, the Cross-Initial Brief below.

B. Who was included on the settlement check was not an essential term of the contract.

Since the manner in which the check was to be made payable was not explicit from the text of the proposal, it equally was not an essential element of the contract.

Certainly, what is an 'essential term' of a contract differs according to circumstances. But, surely, it must include the terms specified in an offer to make a contract. This is because an acceptance is effective to create a contract only if it is absolute and unconditional, and identical with the terms of the offer.

Giovo v. McDonald, 791 So. 2d 38, 40 (Fla. 2d DCA 2001). "Uncertainty as to nonessential terms or small items will not preclude the enforcement of a settlement agreement." Spiegel v. H. Allen Holmes, 834 So. 2d 295, 297 (Fla. 4th DCA 2002). Accord Leopold v. Kimball Hill Homes Fla., 842 So. 2d 133, 137 (Fla. 2d DCA 2003) ("Every potential contingency does not need to be addressed in order for there to be an enforceable contract."). "Stated differently, a settlement will be enforced if it is sufficiently capable

of implementation.” PNC Bank, N.A. v. Rolsafe Int’l, LLC (In re Rolsafe Int’l, LLC), 477 B.R. 884, 903 (Bankr. M.D. Fla. 2012).

For instance, in Marin v. Infinity Auto Ins. Co., 239 So. 3d 751 (Fla. 3d DCA 2018), Marin was involved in an automobile accident and was treated at Jackson Memorial Hospital. Id. at 753. The insurance company believed that the Hospital had a lien for the medical services it provided. Id. Marin’s attorney sent a demand letter to the insurance company stating: “It is my understanding that your insured has \$10,000 in available liability coverage, which I am requesting that your company tender by delivering the settlement draft to my office by the close of business on April 28, 2014.” Id. at 753. The insurance company timely responded and stated it “agreed to meet Marin’s settlement demand.” Id. (cleaned up). The response enclosed a settlement check for \$10,000 made payable to Marin, his attorney, **and** Jackson Memorial Hospital. Id.

Marin claimed this was a counteroffer since Jackson Memorial Hospital was listed as a payee. Id. The insurance company offered to reissue the check and did reissue the check without including Jackson Memorial Hospital. Id. After Marin rejected these attempts, the insurance company moved to enforce the settlement. Id. The trial court granted the motion. Id.

On appeal, the Third District analyzed whether the insurance company's response was an acceptance or a counteroffer. Id. Marin asserted that inclusion of Jackson Memorial Hospital on the check added a new essential term to the agreement, thereby making it a counteroffer. Id. The Third District rejected this argument. Id. The offer only contained two essential terms: 1) the insurance company must tender the \$10,000 limit; and 2) it must do so by April 28, 2014. Id. at 754. The offer did not state how the check was to be made payable. Id. Since the offer did not specify the payee information, it was *not an essential term*. Id.

The Third District further explained that because Jackson Memorial Hospital may have had an actionable lien, this created a dilemma for the insurance company. Id. at 755. If Jackson Memorial Hospital was not going to pursue that lien, Marin simply needed to request the settlement check to be reissued—as the insurance company offered to do. Id.

In the instant case, who was to be included on the settlement check was merely a procedural formality to the agreement because only two conditions were demanded in the letter sent by Marin's attorney. Once the offer was made to Infinity, all that was required by Infinity to form a valid settlement agreement was acceptance. By tendering the full policy limits by April 28, 2014, Infinity accepted the demands stated in the offer by Marin, thus, forming a valid settlement agreement.

Id. at 756.

Marin concerns the same legal issue involved in this matter. In both cases, there was a valid lien on any settlement proceeds, the offer was silent as to how the check was to be made payable, the offeree included the lienholder on the settlement check, and the offeree offered to reissue the check without the lienholder. On appeal, Souders entirely fails to distinguish the directly analogous holding in Marin.

Instead, Souders cites this Court's decision in JF & LN, L.L.C. v. Royal Oldsmobile-GMC Trucks Co., 292 So. 3d 500 (Fla. 2d DCA 2020), asserting its holding is applicable to show Suarez Trucking materially breached the settlement agreement in the present case. As an initial matter, there is clearly a difference between issuing a check when there are insufficient funds (as was the case in JF & LN), and including a lienor as an additional payee when there was a statutory duty to do so as in the instant case. Second, proper application of this Court's discussion in JF & LN of what constitutes a material breach shows that no such breach occurred here. This Court explained:

When focusing on the breach of the contract, not every breach permits the nonbreaching party to cease performance. Instead, the failure to perform the contractual obligation must be central to the contract or, in other words, material. To determine whether the conduct rose to the level of a "material breach," we must look to the language of the contract and measure the breaching party's shortfall or failure in performance. As stated by our sister court, "To constitute a vital or material breach a

defendant's nonperformance must be such as to go to the essence of the contract; it must be the type of breach that would discharge the injured party from further contractual duty on his part." Beefy Trail, Inc. v. Beefy King Intern., Inc., 267 So. 2d 853, 857 (Fla. 4th DCA 1972). A trivial noncompliance or minor failure to perform is not a material breach. Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker, 160 So. 3d 955, 960 (Fla. 5th DCA 2015) (emphasis added).

Id. at 509.

Souders also repeatedly cites and relies on this Court's decision in Suarez Trucking I, despite acknowledging that the Florida Supreme Court reversed that very same decision. As Souders should recognize, this Court is bound by the Supreme Court's decision in Suarez Trucking II.

Since the proposal for settlement was silent as to who should be included on the check, it was not an essential term. The essential term was payment of \$500,000. (R. 248–249). How the check was made payable was a mere procedural formality. Cf. Lunas v. Cooperativa De Seguros Multiples, 100 So. 3d 239, 242 (Fla. 2d DCA 2012) (where how checks were made payable was an essential term of the offer and it required two checks to be issued in a certain amount and in a certain manner).

Where the settlement offer is silent, Suarez Trucking did what is customary when faced with a lienholder: it included that lienholder on the settlement check. See, e.g., GEICO Gen. Ins. Co. v. Steinger, Iscoe &

Greene-II, P.A., 275 So. 3d 775, 777 (Fla. 3d DCA 2019) (“We agree with the trial court that GEICO had a duty to protect SIG’s attorney’s lien by notifying SIG of the settlement, including SIG on the settlement check”); Bell v. Geico Gen. Ins. Co., 2011 U.S. Dist. LEXIS 162009, No. 6:09-cv-876-ORL-35KRS, at *8 (M.D. Fla. Dec. 14, 2011), aff’d, 489 Fed. Appx. 428 (11th Cir. 2012) (“The Court finds that no cause of action for bad faith ever accrued pursuant to Section 624.155 because GEICO was contractually entitled to include ORMC as a payee on the settlement check so long as ORMC held a valid lien on the settlement payment.”); Margiotta v. State Farm Mut. Auto. Ins. Co., 622 So. 2d 135, 136 (Fla. 4th DCA 1993) (“Moreover, even if there had been competing claims by the hospital and the insured, the insurer was not entitled to simply do nothing. It should have issued a joint check to the hospital and the insured or interpleaded the funds.”); Williams Heating & Air Conditioning Co. v. Williams, 551 So. 2d 559 (Fla. 5th DCA 1989) (explaining tortfeasor placed plaintiff and worker’s compensation carrier on settlement check, and therefore, did not need the protection of the worker’s compensation statute); Gov’t Empls. Ins. Co. v. Gonzalez, 512 So. 2d 269, 270 (Fla. 3d DCA 1987) (holding it was appropriate for the insurance company to issue its check payable to the hospital and the insured).

Justice Canady’s statement in his concurring opinion bears repeating here: “When the contract is understood in light of these existing relationships and obligations, as is required by the well-established rule of incorporation, it is hard to see how Suarez Trucking’s tender of the settlement check with the workers’ compensation carrier named as a payee could be a breach—**much less a material breach**—of the settlement agreement.” (emphasis added). Suarez Trucking II, 350 So. 3d. at 47. Two Justices of the Florida Supreme Court opined there was no breach of the settlement agreement by Suarez Trucking, much less a material breach. Their analysis clearly rejects the assertion made by Souders, that it was an essential term of the offer that the settlement check be made payable only to him.

C. Including the lienholder on the check was consistent with the requirements of section 440.39, Florida Statutes.

Section 440.39, Florida Statutes, establishes and governs an employer/carrier’s subrogation rights in cases where the employee accepts workers’ compensation benefits. See § 440.39, Fla. Stat.; Cont’l Ins. Co. v. Indus. Fire & Cas. Ins. Co., 427 So. 2d 792, 793 (Fla. 3d DCA 1983) (“[T]here is no common law cause of action for failure to recognize and protect subrogation rights of a workmen’s compensation carrier; subrogation

on the part of an employer's carrier in a workmen's compensation case is solely a creature of statute[.]") (citations omitted).

"[O]nly one suit against an alleged tortfeasor is contemplated by section 440.39" and the statute dictates the circumstances when the suit and settlement decisions are under the control of the employee and when they are under the control of the employer/carrier. See Kimbrell v. Paige, 448 So. 2d 1009, 1011 (Fla. 1984); Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182, 1183 (Fla. 4th DCA 2005) ("The purpose of the statute is to allow an employer or carrier to be made whole when workers compensation benefits have been paid to a beneficiary who later recovers from a third-party for the same injury.").

An examination of the statutory scheme of section 440.39 demonstrates that "[i]ts creation 'involved a legislative balancing of competing interests, creating a system of shared benefits and burdens for its participants.'" Summit Claims Mgmt., 913 So. 2d at 1184 (quoting Sun Bank/South Fla., N.A. v. Baker, 632 So. 2d 669, 672 (Fla. 4th DCA 1994)).

When Florida first adopted the "Workmen's Compensation Act" in 1935, [Ch. 17481, § 39, Laws of Fla. (1935)] an employee injured on the job by a third-party was required to elect between: (1) claiming workers

compensation benefits from the employer/carrier; or (2) bringing an independent tort action against the third-party. See Aetna Cas. & Sur. Co. v. Bortz, 271 So. 2d 108 (Fla. 1972). If the employee elected benefits, the employee had no right to sue in tort and the employer/carrier had the exclusive right to pursue the tortfeasor for subrogation. Id. The employer had complete control over whether to settle the tort claim.

The Act was amended in 1947 to allow the employee to sue the tortfeasor but only if the employer/carrier denied compensation, waived its subrogation rights, or failed to sue the tortfeasor within one year. Id. Then, in 1951, the Legislature significantly amended section 440.39 by abolishing the election requirement and permitting the employee to simultaneously pursue: (1) benefits from the employer/carrier; and (2) a suit for damages against the tortfeasor. See id.; Ch. 26546, § 1, Laws of Fla. (1951); Fidelity Cas Co. v. Bedingfield, 60 So. 2d 489, 493 (Fla. 1952).

Under the 1951 amendments, the employer/carrier can only sue the tortfeasor if the employee fails to do so within one year. Id. If the employee files suit, the employer/carrier may file a notice of payment of compensation benefits which operates as a lien upon any judgment or settlement recovered by the employee in the tort action. Id. If the notice

is filed, the employer has a right to seek equitable distribution of its pro rata share of the net amount recovered after reductions for costs and attorneys' fees expended in obtaining the judgment or settlement. Id.

In 1959, the Legislature added a provision that the right to sue the tortfeasor reverts back to the employee in "Year 3" if the employer/carrier fails to sue the tortfeasor during "Year 2". See Bortz, 271 So. 2d at 113; Ch. 431, § 1, Laws of Fla. (1959).

In 1970, the Legislature added a requirement that the employer/carrier must give the employee 30 days' notice before filing suit against the tortfeasor in "Year 2". See Bortz, 271 So. 2d at 113; Ch. 148, § 6, Laws of Fla. 1970. "Thus, we have gone from an approach favoring total reimbursement of the employer, to an approach providing for an alternative distribution depending on who initiates suit or settlement, and when it is done." Bortz, 271 So. 2d at 113.

The current version of the statute follows the three-year system established in the 1951, 1959, and 1970 amendments. See § 440.39, Fla. Stat. In "Year 1", the employee has the exclusive right to sue the tortfeasor subject to the employer/carrier's right to equitable distribution of its pro rata share of any recovery—provided that the employer/carrier files a notice of payment. See § 440.39(3)(a), Fla. Stat. The employee has the option to

bring suit “in the name of” (1) the employee; or (2) the employee and for the use and benefit of the employer/carrier. Id. However, “[i]n all claims or actions at law against a third-party tortfeasor, the employee . . . shall sue for the employee individually **and for the use and benefit of the employer . . . or employer’s insurance carrier[.]**” Id. (emphasis added). If the employee and the employer/carrier cannot agree on the amount owed to the employer/carrier, the court resolves the dispute. § 440.39(3)(b), Fla. Stat.

If the employee doesn’t sue the tortfeasor in “Year 1”, the employee and employer/carrier have “concurrent” rights to sue the tortfeasor in “Year 2.” See § 440.39(4)(a), Fla. Stat.; Maryland Cas. Co. v. Smith, 272 So. 2d 517, 519 (Fla. 1973) (“[T]he rights of the employer and employee are concurrent in the second year until one or the other acts first.”). The employer/carrier must give the employee 30 days’ notice before suing the tortfeasor. Id. If the employee still hasn’t sued after 30 days, the employer/carrier can assert the employee’s tort claims against the tortfeasor. Maryland Cas., 272 So. 2d at 519. In an employer/carrier’s “Year 2 suit,” the employer/carrier’s reimbursement is not limited to a pro rata equitable distribution. Id. It is measured by the benefits the employer/carrier paid and anticipates paying the employee in the future.

Id. After the employer/carrier's claim is satisfied, any remainder goes to the employee. Id. In a "Year 2" suit, both the employee and the employer/carrier must agree on any settlement. § 440.39(5), Fla. Stat.

If the employer/carrier does not sue in "Year 2", the exclusive right to sue reverts back to the employee in "Year 3." See § 440.39(4)(b), Fla. Stat. The employer/carrier must then file a notice of payment and seek equitable distribution under the provisions of subsection (3). Id.

In this case, Souders sued Suarez fourteen days after the accident. So, the case falls into a "Year 1" scenario under section 440.39(3).

i. Souders's arguments ignore the express statutory mandates established by section 440.39.

Souders suggests that Suarez Trucking's inclusion of Guarantee on the settlement check injected a lien dispute into this case and imposed an additional condition upon Souders's ability to accept the process of the tendered check. However, at the time Souders sent his proposal for settlement, Guarantee had already followed the statutory procedures, filed its notice of payment, perfected its lien, and was entitled to equitable distribution of its pro rata share from any settlement or judgment.

By perfecting its lien, Guarantee—not Suarez Trucking—injected a lien dispute into this action. See Com. Union Ins. Co. v. Fallen, 603 So.

2d 610, 613 (Fla. 5th DCA 1992) (“The lien of the employer or its compensation carrier attaches when the amount is liquidated through judgment or settlement. The right to distribution of the proceeds of the judgment or settlement is after the funds are collected and the employees and carrier either agree on the pro rata share due the carrier or a court awards the pro rata share.”).

Souders also asserts that Suarez Trucking’s ‘gambit’ of including the lienholder on the settlement check “instantaneously and completely disrupted payment, and thereby entirely deprived Souders of control of the funds, which was the essence of the bargain the parties struck.” (Initial Br. at 31–32). But Souders’s reasoning again overlooks the fact that, regardless of who the check was made out to, Guarantee already perfected a claim to a portion of the settlement amount and Souders did not have an absolute right to retain all of it.

As Souders argued below, and in his previous briefing before this Court in the prior appeal:

[A] tortfeasor who has paid settlement proceeds to a tort victim is in no position to determine the amount of a compensation carrier’s lien. The amount of the lien is strictly a matter between the employee and his employer’s carrier, because Fla. Stat. § 440.39, **entitles the carrier to only a pro rata share of the employee’s recovery** -- to be determined by percentage deductions for the employee’s attorney’s fees and costs and a

demonstration that the employee recovered less than the full value of his or her actual damages.

These are issues that can only be resolved by **negotiation or litigation** between the employee and the carrier after settlement proceeds have been recovered.

(R. 1283–1287) (emphasis added). See also Brief of Appellee at 9–10, Suarez Trucking I, 311 So. 3d 263 (No. 2D19-572), 2019 FL App. Ct. Briefs LEXIS 1020, at *10.

Thus, Souders admitted that Guarantee had a right to a pro rata share of the settlement funds that Souders demanded from Suarez Trucking and he would have to resolve any dispute with Guarantee through negotiation or litigation. Souders arguments fail to explain how including or excluding Guarantee on the check would affect his ability to negotiate or litigate against Guarantee.

Also contrary to Souders’s claims, Suarez Trucking did not affect Souders’s ability to negotiate the amount of the workers’ compensation lien by issuing the settlement check for a single amount made payable to Souders, his attorney, and Guarantee. Nor did Suarez Trucking’s actions prevent Souders from requesting the court determine the amount of the lien as he was free to do under section 440.39(3)(b).

Suarez Trucking made no comment on how much Guarantee should receive and left that entirely up to Souders and Guarantee to resolve through “negotiation or litigation.” See id.

In fact, as Souders pointed out in his arguments below, “both before and after [Souders’s] Proposal for Settlement was filed, plaintiff’s counsel had advised [Suarez Trucking’s] counsel that his client, [Souders], had a statutory obligation to satisfy the compensation carrier’s lien; that he fully intended to do so in accordance with Florida law; and that he had been actively involved in **negotiating** the amount of the lien with counsel for the compensation carrier.” (R. 1283–1287) (emphasis added). If that is the case, there could be no valid basis whatsoever for Souders to object to the inclusion of Guarantee on the check. That also means inclusion of Guarantee would not constitute a breach—let alone a material one.

Lastly, Souders claims that Suarez Trucking’s inclusion of Guarantee on the settlement check was inconsistent with the offer’s requirement that payment be made “to the Plaintiff ADAM J. SOUDERS.” This statement overlooks the statutory mandate that deems Souders’s action as “for” Souders and “for the use and benefit of” Guarantee. See § 440.39(3)(a), Fla. Stat. Souders was deemed to be suing “for” himself

and Guarantee; therefore, a request for payment “to the Plaintiff, ADAM J. SOUDERS” does not preclude payment to both.

Inclusion of Guarantee on the check is consistent with the “use and benefit” requirement and the overall statutory scheme geared toward protecting the employer/carrier’s subrogation rights. It also promotes the public policy behind those rights to be made whole and should be encouraged, not discouraged.

As a general rule, lien holders must be included on settlement checks to avoid impairment of that lien even where there is uncertainty as to the possession of the lien. Marin, 239 So. 3d at 754–55 (discussing the rights of a hospital to the proceeds of a settlement by a patient with an insurance company); Steinger, 275 So. 3d at 777 (stating that, in the context of an attorney lien, the paying party has “an affirmative duty to notify the law firm of the settlement and to protect the law firm’s lien interest in the settlement proceeds”) (quoting Hall, Lamb & Hall, P.A. v. Sherlon Invs. Corp., 7 So. 3d 639, 641 (Fla. 3d DCA 2009)).

Souders’s repeated claim that Suarez Trucking's inclusion of the lienholder on the check was a calculated ‘gambit’ used to gain some unidentified tactical advantage, is entirely unsupported by the record. There was nothing done here to gain any advantage for Suarez Trucking.

To the contrary, the only tactical "gambit" in this case was by Souders (1) wrongfully refusing to accept Tomas and Suarez Trucking's offer to reissue the joint settlement check without the lienholder, and (2) accepting a \$500,000 settlement payment from Tomas and then asking to be unjustly enriched with *another* \$500,000 from Suarez Trucking.

- ii. **Because it had notice of the lien, Suarez Trucking included the lienholder on the settlement check to protect all interests.**

It is undisputed that Guarantee had a valid lien. (R. 48). Under Section 440.39, Florida Statutes, a worker's compensation carrier has a right of subrogation against any tortfeasor for benefits it paid to an employee. § 440.39(2), Fla. Stat. Upon the filing of a lawsuit against the tortfeasor, the carrier "may file in the suit a notice of payment of compensation and medical benefits to the employee or his or her dependents, which notice shall constitute a lien upon any judgment or settlement. . . ." Id. at (3).

"This section is designed to prevent settlement between an employee and tortfeasor without notice to the insurance carrier." Zurich v. Weeden, 805 So. 2d 945, 947 (Fla. 4th DCA 2001). It is to "prevent a claimant from receiving a double recovery from the tortfeasor and the insurer for the

same accident.” Orlando Reg’l Healthcare Sys. v. Tiznado, 804 So. 2d 1267, 1269 (Fla. 5th DCA 2002).

“A tort-feasor who has notice of the carrier’s subrogation claim settles with the employee only at the tort-feasor’s own risk, unless the carrier is notified.” Century Elevator Co. v. Spinosa, 652 So. 2d 451, 452 (Fla. 4th DCA 1995). Accord Bituminous Cas. Corp. v. Fla. Power & Light Co., 190 So. 2d 426, 428 (Fla. 4th DCA 1966) (“A third party who has notice of the subrogation claim may settle with the injured employee but only at his own risk, for such a settlement affects only the employee’s claim unless the carrier is notified so that it may participate therein.”).

Where a case is settled in lieu of suit or during the pendency of a suit and the tortfeasor has notice of the employer's interest in the settlement, the case should not be settled without the consent of the carrier or employer in order to protect the employer to the extent of benefits conferred. Generally, section 440.39(3)(b) is designed to prevent settlement between an employee and tortfeasor without notice to the carrier. Section 440.39(3)(b) preserves an employer’s right to obtain equitable distribution if its provisions are satisfied.

Circle K Corp. v. Webster, 747 So. 2d 1010, 1011 (Fla. 5th DCA 1999) (explaining that due process rights are implicated where the parties attempt to settle without notifying the worker’s compensation lienholder).

Souders’s attempt to distinguish the decision in Webster as “unwarranted dictum which . . . conflicts with section 440.39,” is unavailing.

The central, and only, issue in Webster concerned whether the parties' attempt to foreclose the lienholder by settling and dismissing the underlying action without proper notice to the lienholder violated due process. Id.

The court determined that the parties' failure to notify the lienholder of the settlement, the joint stipulation for dismissal, and the final order of dismissal violated the plain notice requirements set forth in section 440.39. Id. This holding addressed the sole issue in the case and is clearly not "unwarranted dictum." Indeed, Justice Canady cited favorably this exact quote from the holding in Webster when discussing the notice requirements of section 440.39 in his concurring opinion in Suarez Trucking II. See Suarez Trucking II, 350 So. 3d. at 45 (Canady, J., concurring).

Like in Webster, there is nothing in the record here to indicate that Souders's attorney ever communicated with Guarantee about its proposal for settlement or sought its approval of the impending settlement. Given that Suarez Trucking could not ascertain whether Guarantee had been notified of the impending settlement, it therefore tendered the check jointly in order to protect all interests.

"After the lien attached, [Suarez Trucking] was not at liberty to settle the claim and be free of liability." Dade Cty. v. Pavon, 266 So. 2d 94, 96 (Fla. 3d DCA 1972). See also City of Tampa v. Norton, 681 So. 2d 811,

812 (Fla. 2d DCA 1996) (explaining the plaintiff and the worker's compensation carrier either agree on the pro rata share or a court awards the pro rata share). The worker's compensation carrier had a right to distribution of the proceeds of any settlement. Fallen, 603 So. 2d at 613.

As a result, Suarez Trucking necessarily was required to include the lienholder on the settlement check—especially in light of Souders's refusal to affirm the lien would be satisfied. (R. 242). See World Fin. Grp., LLC v. Progressive Select Ins. Co., 300 So. 3d 1220, 1221 (Fla. 3d DCA 2020) (holding carrier failed to protect lienholder's interest when it issued a settlement check only to plaintiff and did not include lienholder on check). It is not unusual for worker's compensation lienholders to be included on settlement checks where the tortfeasor has knowledge of payment of worker's compensation benefits or a lien. See, e.g., Williams, 551 So. 2d at 559 n.1.

If Suarez Trucking failed to include Guarantee on the settlement check and protect the lien, it could have faced a cause of action for impairment of lien or for subrogation. See § 440.39, Fla. Stat.; Pavon, 266 So. 2d at 96; Sherlon Invs. Corp., 7 So. 3d at 641. It would have been settling at its own risk. Bituminous Cas. Corp., 190 So. 2d at 428; Century Elevator Co., 652 So. 2d at 452. Suarez Trucking would have been at risk

of paying an amount greater than the proposal for settlement. Its attorneys could have also been at risk for purposely avoiding the lien. See, e.g., The Florida Bar v. Sweeney, 730 So. 2d 1269 (Fla. 1998).

This was not some “unsubstantiated fear” as characterized by Souders. (Initial Br. at 47). And Florida Rule of Civil Procedure 1.442(c)—which does not address subrogation or a lien—was not sufficient to protect Suarez Trucking. Fla. R. Civ. Pro. 1.442(c)(4) (addressing joint proposal for settlement for vicariously or derivatively liable parties).

As shown in the record, Suarez Trucking’s counsel reached out to Souders’s counsel twice and inquired whether he would satisfy the lien. (R. 242). Nevertheless, Souders’s counsel refused to provide assurances that the lien would be satisfied during the acceptance period. (R. 242). This was not an imaginary fear. This was a valid lien, which could expose Suarez Trucking to liability if it were not handled properly.

Accordingly, Suarez Trucking had a duty, pursuant to section 440.39, to include the worker's compensation carrier on the check. Including the workers' compensation lienholder on the check was not only proper, but mandated by the law.

iii. Inclusion of the lienholder did not lessen the amount paid to Souders or mean he did not get the benefit of his bargain.

Contrary to Souders's suggestion, the inclusion of the lienholder on the settlement check did not lessen the amount to Souders and did not mean he did not timely receive the benefit of the bargain. Souders ultimately received the same amount in the settlement check regardless. Suarez Trucking timely delivered a check in the amount of \$500,000 and even offered to reissue without the lienholder once the objection was raised.

Furthermore, Souders's argument misunderstands the effect of a lien. Again, it is undisputed there is a valid lien. As such, the lienholder was entitled to a portion of the settlement funds under section 440.39, Florida Statutes. At the end of the day, this statutory lien was required by law to be addressed and satisfied. It cannot simply be ignored as Souders suggests. Rather, the parties had an affirmative duty to protect the lien since they had notice thereof.

D. Souders could not accept the proceeds of the settlement check, even if it had been made solely to him.

As Justice Canady's concurrence correctly noted when discussing the application of section 440.39, in the instant case: "[Souders] was not entitled to the disbursement of funds paid in settlement of his claim prior to

an agreed or judicially determined resolution of the workers' compensation lien. The settlement funds provided to Souders indisputably were legally encumbered by the lien." Suarez Trucking II, 350 So. 3d. at 47.

In other words, even if the settlement check was made payable solely to Souders, contrary to his suggestion otherwise, the funds could not have been disbursed to Souders until the workers' compensation lien was determined by the parties or by the court. Thus, Souders could not have accepted the proceeds of the settlement check, even if it had been made solely to him.

Souders, as he must, admits as "true that the lien precluded Souders from having access to the funds for his own use until he reached an agreement with Guarantee over the valuation of its lien[.]" (Initial Br. at 32). This admission eviscerates Souders's argument that somehow Souders was not "paid." Indeed, the entire "fundamental" foundation for Souders's argument is that "Souders could not control its deposit and thereby take possession of its funds." (Initial Br. at 25). But by acknowledging as "true that the lien precluded Souders from having access to the funds . . . ," Souders destroys his own argument that he was not "paid." In other words, he agrees he would not have access to the funds *even if* Guarantee was not included on the check *until* he reached an agreement over the valuation of

Guarantee's lien. This admission destroys Souders's argument that inclusion of Guarantee on the check somehow materially breached the agreement. Souders's attempt to split hairs over the meaning of access and control does not affect his admission.

The record plainly shows that the workers' compensation lien had not been resolved as of the date of the acceptance of the Proposal for Settlement. That is clear from the communication from Souders's counsel to Suarez Trucking's counsel on May 4, 2015, in which Souders's counsel stated:

I spoke with Mr. D'Ambrosio [the attorney for the workers compensation carrier] several times before the Plaintiff's Proposal for Settlement was filed and again while the Proposal for Settlement was pending to discuss a resolution of Mr. Souders'[s] workers compensation lien. In fact, when your clients filed their Notice of Acceptance of Plaintiffs Proposal for Settlement, I again contacted Mr. D'Ambrosio and we discussed what materials he would need from my office to begin the actual process of satisfying the Workers' compensation lien.

(R. 1273–1274).

According to the foregoing, the process of satisfying the lien had just begun after the Notice of Acceptance of the Proposal for Settlement was filed on March 26, 2015. Presumably, it was never completed as no effort had been made to cash the check until at least April 22, 2015, as is

indicated in the letter by Souders's counsel to Defense counsel, dated April 23, 2015, wherein he stated:

Yesterday I discovered that the check that was provided by Progressive to my office in response to that Proposal for Settlement was not only made payable to the Plaintiff: Mr. Adam Souders, but was also made payable to Guarantee Insurance Company

(R. 1247).

The foregoing reflects that, contrary to the assertion that he could not deposit or negotiate the check when received, Souders's counsel never even looked at the check until April 22, 2015. The only conclusion to be drawn, therefore, is that no effort to negotiate the check was made as of at least April 22, 2015, and the record is not clear as to whether that discovery was made in the process of attempting to negotiate the check or simply by observation of the check. Moreover, there is no record evidence reflecting that Souders and Guarantee had reached an agreement on the lien by April 22, or by any date, thus prohibiting the disbursement of the settlement funds to Souders, even if he had been the sole payee on the check.

Regardless of when Souders received the settlement check, the proceeds of the check could not have been disbursed until Souders and the workers' compensation carrier first agreed to the amount of the lien or, alternatively, allowed the court to do so. Therefore, the inclusion of the

workers' compensation carrier on the check was, at most, a trivial noncompliance or only a minor failure to perform. The trial court correctly found that this was not the type of breach that would discharge Souders from performing his contractual duties under the settlement agreement.

E. Suarez Trucking substantially complied with the contract by offering to reissue the settlement check.

The trial court correctly found that Suarez Trucking substantially complied with the terms of the contract by offering to reissue the settlement check one day after Souders claimed that the original check was noncompliant with the proposal for settlement. Including the workers' compensation carrier on the original check was, at most, a technical breach that is excused by law. Suarez Trucking refutes the finding of *any* breach as detailed in the cross-initial brief below.

In Green Tree Servicing, L.L.C. v. Milam, 177 So. 3d 7, 13 (Fla. 2d DCA 2015), this Court described the parameters of substantial compliance as follows:

Substantial compliance or performance is "that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny" the other party the benefit of the bargain. It is, in essence, the opposite of a material breach of contract that would excuse the nonbreaching party from its obligations.

Id. at 14 (internal citations omitted). See also Ocean Ridge Dev. Corp. v. Quality Plastering, Inc., 247 So. 2d 72, 75 (Fla. 4th DCA 1971) (“Substantial performance is that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor’s right to recover whatever damages may have been occasioned him by the promisee’s failure to render full performance.”).

Thus, substantial performance excuses a technical breach because “actual performance is so similar to the required performance that any breach that may have been committed is immaterial.” Id. (quoting 15 Richard A. Lord, Williston on Contracts, § 44.52, 221–22 n.17 (4th ed. 2000)).

Additionally, the trial court’s reasoning that no specific amount of hindrance was caused by inclusion of the lienholder or offer to reissue the check was also well-supported in this case. As the court correctly found, the proposal for settlement contained no express stipulation that time was of the essence, only a date on which performance was to occur. Souders’s Initial Brief even concedes that “the [trial] court was correct that the contract did not make time of the essence[.]” (Initial Br. at 48).

“Unless there is a determination that ‘time was of the essence,’ a brief delay by one party in the performance of a contract covenant does not discharge the other party’s contractual obligations.” Atlanta Jet v. Liberty Aircraft Servs., L.L.C., 866 So. 2d 148, 150-51 (Fla. 4th DCA 2004).

Therefore, the date that payment was to be made was not an essential term. Moreover, with a pending workers compensation lien preventing disbursement of the funds, the actual payment date became only material when and if the funds could be distributed. See Command Sec. Corp. v. Moffa, 84 So. 3d 1097, 1100 (Fla. 4th DCA 2012); Moss v. Moss, 959 So. 2d 375 (Fla. 3d DCA 2007).

Like in Marin, Suarez Trucking offered to remove Guarantee as a co-payee from the settlement check. This offer was made by Suarez Trucking’s counsel one day after receiving notice from Souders’s counsel asserting that the inclusion of the workers’ compensation carrier was a rejection of the Proposal for Settlement, a conclusion rejected by the Florida Supreme Court. Had Souders agreed to the check being reissued, any delay from April 5, 2015 to April 24, 2015 in Souders’s ability to receive the funds would, for the reasons stated above, not have produced a hardship to the Plaintiff. Therefore, under this scenario, Suarez Trucking

substantially complied with the terms of the contract meaning that there was no material breach of the contract.

CONCLUSION

The trial court correctly found that Suarez Trucking did not materially breach the contract by including the workers' compensation lienholder as a payee on the settlement check. Since the manner in which the check was to be made payable was not explicit from the text of the proposal, it was not an essential element of the contract. Including the lienholder on the check was also consistent with the requirements of section 440.39, Florida Statutes. Because Suarez Trucking substantially complied with the terms of the contract, Souders was not relieved of his contractual obligation to dismiss his claims brought against Suarez Trucking and Tomas.

WHEREFORE, Appellee/Cross-Appellant SUAREZ TRUCKING FL CORP., respectfully requests that this Court—as to Souders's appeal—affirm the trial court's decision to enforce the settlement agreement and its finding that no material breach occurred.

CROSS-INITIAL BRIEF

SUMMARY OF THE ARGUMENT

This cross-appeal seeks to rectify a grave injustice. Souders offered to dismiss **both** Suarez Trucking and Tomas in exchange for \$500,000. Souders received that \$500,000. Based on wrongly convincing the trial court that it had no legal basis to credit Suarez Trucking for the amount already paid, Souders pulled the wool over the eyes of the legal system by obtaining an additional \$500,000 for a double recovery. This injustice cannot stand.

The trial court erred in denying Suarez Trucking's remedy motions to (1) limit Souders's damages, and (2) for leave to amend to assert a counterclaim for breach of contract. Reversal of the trial court's rulings on these issues is necessary to prevent Souders from scheming the judicial system by being unjustly enriched to the tune of \$500,000.

The Florida Supreme Court determined that Suarez Trucking and Tomas accepted a joint proposal for settlement from Souders in the amount of \$500,000, thereby forming a legally binding contract. Had Souders not wrongfully refused to accept settlement checks from the defendants, he would have been paid a total of \$500,000 and his claims against both Suarez Trucking and Tomas would have been dismissed.

However, as a result of the settlement agreement not being properly enforced, Souders was paid \$500,000 on behalf of Tomas to settle the claims that should have been dismissed following the acceptance of the joint proposal for settlement. Thus, Souders has already received all of the damages to which he is entitled by accepting payment of the \$500,000 from Tomas.

The trial court's denial of Suarez Trucking's remedy motions now erroneously requires \$1,000,000 to be paid to Souders in order to comply with the terms of that \$500,000 settlement agreement. Requiring Suarez Trucking to pay another \$500,000, on top of the \$500,000 Souders has already received for the same damages, flies in the face of all concepts of fairness. Accordingly, reversal of the trial court's rulings on these grounds is necessary to prevent Souders from being unjustly enriched with a half-million dollar windfall.

Additionally, despite correctly concluding that no material breach occurred, the trial court erred in finding that Suarez Trucking breached the agreement in any manner. Contrary to the trial court's findings, Suarez Trucking did not materially alter any essential or non-essential term of the contract.

STANDARD OF REVIEW

The trial court's interpretation of a contract is a matter of law subject to de novo review. Verandah Dev., LLC v. Gualtieri, 201 So. 3d 654, 657 (Fla. 2d DCA 2016). "Whether the trial court applied the correct measure of damages on a breach-of-contract claim is a question of law that this court reviews de novo." Asset Mgmt. Holdings, LLC v. Assets Recovery Ctr. Invs., LLC, 238 So. 3d 908, 911 (Fla. 2d DCA 2018). Denial of a motion for leave to amend a pleading is reviewed for abuse of discretion. See Cobbum v. Citimortgage, Inc., 158 So. 3d 755, 757 (Fla. 2d DCA 2015).

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT SUAREZ TRUCKING BREACHED THE CONTRACT.

A. Suarez Trucking fully performed the terms and did not breach the contract.

The trial court erred in finding that inclusion of the lienholder on the settlement check constituted any manner of breach in this case. The record shows that Suarez Trucking fully complied and performed its contractual duties under the settlement contract. Suarez Trucking did not materially alter any term of the contract, whether essential or otherwise.

Even though the check was made payable to Souders, his attorney's trust account, and the lienholder, this fully met the express terms of the

settlement agreement as \$500,000 was timely paid. As discussed above and incorporated herein by reference, Florida case law supports the conclusion that it was proper to add the workers' compensation carrier to the settlement check.

Additionally, the proposal for settlement was silent as to how the check should be made payable. The offer did not state that the settlement check shall be made payable only to Souders or that it be made payable only to Souders and his counsel. It also did not expressly prohibit the settlement check from including the lienholder. The proposal was simply silent in this regard.

[W]here a contract is simply silent as to a particular matter, that is, its language neither expressly nor by reasonable implication indicates that the parties intended to contract with respect to the matter, the court should not, under the guise of construction, impose contractual rights and duties on the parties which they themselves omitted.

Gulf Cities Gas Corp. v. Tangelo Park Serv. Co., 253 So. 2d 744, 748 (Fla. 4th DCA 1971). See also Pasteur Health Plan v. Salazar, 658 So. 2d 543, 544 (Fla. 3d DCA 1995) ("When a contract is silent as to a term, as this contract is, a court should not remedy the deficiency by divining from its crystal ball the drafter's intent.").

As the master of his offer, Souders had the ability to dictate this term and simply failed to do so. See Gustavsson v. Wash. Mut. Bank, F.A., 850

So. 2d 570, 574 (Fla. 4th DCA 2003) (“This cause is but another example that the offeror is still the master of the offer. . . it cannot now ask us to put in a term and condition when it failed to do so and to which Gustavsson did not assent.”).

It was error for the trial court to create a term that was not expressly set forth in the proposal. “Thus, when the terms of a voluntary contract are clear and unambiguous, as here, the contracting parties are bound by those terms, and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties.” Emergency Assocs., P.A. v. Sassano, 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995). Accord Med. Ctr. Health Plan v. Brick, 572 So. 2d 548, 551 (Fla. 1st DCA 1990) (“It is not the role of the courts to make an otherwise valid contract more reasonable from the standpoint of one contracting party.”).

Additionally, “[t]he burden of clarifying the intent or extent of a settlement proposal cannot be placed on the party to whom the proposal is made.” Dryden v. Pedemonti, 910 So. 2d 854, 855 (Fla. 5th DCA 2005). “[A]ny drafting deficiencies [are] construed against the drafter.” Paduru v. Klinkenberg, 157 So. 3d 314, 318 (Fla. 1st DCA 2014).

Nevertheless, the trial court and Souders both construed the proposal for settlement against Suarez Trucking. This was error. If there

was any ambiguity, it should have been construed against the drafter—Souders. City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000); Hurt v. Leatherby Ins. Co., 380 So. 2d 432, 434 (Fla. 1980). The proposal should have been read in favor of Suarez Trucking. Instead, it was erroneously strictly construed against Suarez Trucking.

II. THE TRIAL COURT ERRED IN DENYING SUAREZ TRUCKING'S MOTION TO LIMIT DAMAGES.

Upon remand to the trial court, Souders sought damages that included payment of an additional \$500,000 based on the settlement agreement formed upon Suarez Trucking and Tomas's acceptance of the February 25, 2015 joint proposal for settlement, plus pre-judgment interest from the date of the acceptance of the proposal until the \$500,000 is paid. However, Souders has already received all of the damages to which he is entitled by accepting payment of \$500,000 from Co-Defendant Tomas.

The February 25, 2015 Proposal for Settlement at issue in this case was a joint Proposal for \$500,000 served on the actively liable party, Tomas, and the vicariously liable party, Suarez Trucking. The Florida Supreme Court determined that this Proposal for Settlement was accepted by Suarez Trucking and Tomas, and that the only issues that remained were the issues of performance and remedy.

With the Final Judgment now reversed, Souders is seeking to be paid twice for the same damages caused by Tomas: \$500,000 already paid by Tomas **and** \$500,000 to be paid by Suarez Trucking, for a total of \$1,000,000. Had Souders accepted the offered check with the worker's compensation carrier removed, he would have been paid a total of \$500,000—the full amount under the accepted proposal for settlement.

However, he wrongfully refused to accept a reissued settlement check made payable solely to him. As a result, Progressive Express Insurance Company, the insurer for Tomas and Suarez Trucking, paid \$500,000 on behalf of Tomas to settle the claims that should have been dismissed following the acceptance of the proposal and formation of the enforceable settlement agreement. This meant that, at trial, Suarez Trucking would have received a \$500,000 set off. Felgenhauer v. Bonds, 891 So. 2d 1043 (Fla. 2d DCA 2004). Indeed, that setoff was applied to the original (now-vacated) Final Judgment.² Thus, Suarez Trucking should not have to pay an additional \$500,000 on top of the \$500,000 already paid by Tomas.

² Suarez Trucking's entitlement to this setoff was undisputed as it related to the original Final Judgment, which expressly stated: "As a further set-off against the Plaintiff's jury verdict, the parties have agreed to reduce the total net amount by \$500,000.00 for payment made on behalf of the Defendant's driver, Ynefre Fernandez Tomas." (R. 1132).

By rejecting that check that he was contractually obligated to accept, Souders is now seeking to be placed in a better position than if he had accepted the \$500,000.00 check that Suarez Trucking and Tomas offered to reissue. Souders' gambit in this regard cannot stand.

“Regarding the measure of damages in breach of contract cases, ‘[i]t is well-settled that the purpose of damages is to restore an injured party to the same position that he would have been in had the other party not breached the contract.’ Sch. Bd. v. Pierce Goodwin Alexander & Linville, 137 So. 3d 1059 (Fla. 4th DCA 2014) (quoting Lindon v. Dalton Hotel Corp., 49 So. 3d 299, 305–06 (Fla. 5th DCA 2010)); see also Capitol Env’t Servs., Inc. v. Earth Tech, Inc., 25 So. 3d 593, 596 (Fla. 1st DCA 2009); Mnemonics, Inc. v. Max Davis Assocs., Inc., 808 So. 2d 1278, 1280 (Fla. 5th DCA 2002).

Thus, in restoring the injured party to the “same position,” the party “is not entitled to be placed, because of that breach, in a position better than that which he would have occupied had the contract been performed.” Lindon, 49 So. 3d at 305–06; see also Restatement (Second) of Contracts § 347 cmt. a (1981) (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will . . . put him in as good a

position as he would have been in had the contract been performed.”). Gualtieri, 201 So. 3d at 657.

Applying the law as stated in the foregoing cases shows that the only damages to which Souders is entitled are those that were “occasioned him by [Suarez Trucking’s] failure to render full performance.” Id. In this case, damages should be limited to the interest from the date payment was due until Suarez Trucking offered to reissue the check. The \$500,000 need not be paid again.

The reasonable expectations of the parties was that, for the payment of \$500,000, both Suarez Trucking and Tomas would be dismissed. Indeed, that was expressly provided for in the joint proposal for settlement. That would have satisfied the reasonable expectations of the parties. To require Suarez Trucking to pay another \$500,000, on top of the \$500,000 already received, would be to unjustly enrich the plaintiff via a windfall.

Souders is not entitled to be put in a better position than had the contract been performed by his having accepted the reissued check. Accordingly, the trial court erred in refusing to limit Souders’s damages to pre-judgment interest from the date the Proposal was accepted until the day that the offer was made to reissue the check—March 26 to April 24, 2014, a total of 29 days.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING SUAREZ TRUCKING'S MOTION FOR LEAVE TO AMEND.

Suarez Trucking further requested that if the trial court determined that Suarez Trucking must pay an additional \$500,000, then the court should likewise impose an equitable lien on the proceeds of the settlement with Tomas to prevent unjust enrichment to Souders. At a minimum, Suarez Trucking further requested that the court permit the filing of a counterclaim to assert that claim. The trial court abused its discretion in denying these requests under its Motion for Leave to Amend.

Unjust enrichment is a compulsory counterclaim that must be raised or waived. Biondo v. Powers, 805 So. 2d 67 (Fla. 4th DCA 2002). If Suarez Trucking was allowed to bring a counterclaim at the time requested, dismissal of the main action would still allow the counterclaim to remain pending.

At the hearing on Suarez Trucking's remedy motions, the trial court expressed concern that it would have no jurisdiction over the proposed counterclaim if the claim against Suarez Trucking were to be dismissed. However, "the filing of a motion to amend to add a counterclaim is treated the same as a pending counterclaim for purposes of Florida Rule of Civil Procedure 1.420(a)(2)." Cabrera v. U.S. Bank Nat'l Ass'n, 281 So. 3d 516 (Fla. 4th DCA 2019).

As provided in Florida Rules of Civil Procedure Rule 1.420:

(2) By Order of Court; If Counterclaim. Except as provided in subdivision (a)(1) of this rule, an action shall not be dismissed at a party's instance except on order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been served by a defendant prior to the service upon the defendant of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

In Gull Constr. Co. v. Hendrie, 271 So. 2d 775 (Fla. 2d DCA 1973), this Court addressed the applicability of rule 1.420(a)(2) to pending motions for leave to amend to assert a counterclaim, and explained:

While it is true that rule 1.420(a)(2), R.C.P., relating to voluntary dismissals, prohibits such dismissal of an action to the prejudice of a pending counterclaim, and does not specifically contemplate a pending motion for leave to file one, we believe the rule is equally applicable in either case. The proper and timely taking of any action permitted by the rules of civil procedure tolls or stays the progress of the cause until such action is resolved either by the parties or the court as the rules in such case contemplate.

Id. at 766.

This Court concluded that because the appellant had “properly and timely sought to amend his pleadings . . . [t]he effect of a subsequent notice of voluntary dismissal was therefore stayed.” Id. See also Our Gang, Inc. v. Commvest Secur., Inc., 608 So. 2d 542, 544 (Fla. 4th DCA 1992) (holding

the trial court erred when it dismissed an action where defendant's motion for leave to file an amended counterclaim and crossclaim was pending when the plaintiff filed a notice of voluntary dismissal).

Here, Suarez Trucking's motion to amend was filed prior to any dismissal being entered and prior to the trial court's September 15, 2023 Order ruling on the issue of breach. Contrary to the trial court's reasoning, an impending dismissal of the action following its ruling to enforce the settlement agreement in no way prohibited the court from granting Suarez Trucking's pending motion to amend to assert a counterclaim. In fact, the exact opposite is true. Under rule 1.420(a)(2), the pending motion and service of the proposed counterclaim prohibited a subsequent *dismissal*, not the other way around. See Gull Constr., 271 So. 2d at 766; Our Gang, 608 So. 2d at 544 ("Under these circumstances, the action should not have been dismissed.").

Therefore, once Suarez had filed its Motion to Amend, the counterclaim could remain pending, and the court would have maintained jurisdiction to hear it. The trial court erred in denying Suarez Trucking's Motion to Amend based on the misplaced belief that it lacked authority or jurisdiction to permit the amendment.

CONCLUSION

The trial court erred in finding that any manner of breach occurred by Suarez Trucking's inclusion of the lienholder on the settlement check. The court further erred in denying Suarez Trucking's motion to limit damages and motion for leave to amend to assert a counterclaim. The trial court's erroneous rulings unjustly enrich Souders and require he be paid a total of \$1,000,000 to satisfy a \$500,000 proposal for settlement that was jointly accepted by Suarez Trucking and Tomas to resolve all claims in this action. Reversal on these issues is necessary to prevent Souders from unjustly receiving a \$500,000 windfall.

WHEREFORE, Appellee/Cross-Appellant SUAREZ TRUCKING FL CORP., respectfully requests that this Court reverse and remand with instructions for the trial court to (1) enforce the settlement agreement on the ground that Suarez Trucking did not breach the contract; (2) limit any damages awarded to, at most, prejudgment interest from the date the settlement agreement was formed to the date Suarez Trucking offered to reissue the settlement check; and (3) grant Suarez Trucking leave to amend its pleadings to assert its proposed counterclaim against Souders for breach of contract.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via EPORTAL to: **Stephen F. Rosenthal, Esq., Christina H. Martinez, Esq.**, Orseck, P.A., One S.E. 3rd Avenue, Suite 2300, Miami, FL 33131 (srosenthal@pdhurst.com; cmartinez@podhurst.com); **Chris M. Kavouklis, Esq.**, Brennan, Holden & Kavouklis, P.A, 115 S. Newport Avenue, Tampa, FL 33606-1943 (chris@bhklawfirm.com, christine@bhklawfirm.com); **Jody M. Valdes, Esq.**, Weekley Schulte Valdes, LLC, 1635 N. Tampa St 100, Tampa, FL 33602-2646 (service@wsvlegal.com, kvservice@wsvlegal.com); this 23rd day of September, 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with Florida Rules of Appellate Procedure Rules 9.045 and 9.210(a), the undersigned counsel hereby certifies that this brief complies with the font and word requirements of the Rules: Arial 14-point font and does not exceed 22,000 words.

/s/ Kevin D. Franz

KEVIN D. FRANZ

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