

IN THE SUPREME COURT OF GEORGIA  
STATE OF GEORGIA

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**CASE NO. S23C1156**

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AARON PIERCE

Respondent,

v.

KYNDYL YVETTE BANKS and OCTAVIUS AVERY SMITH

Petitioners.

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**AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS  
ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF  
CERTIORARI OF KYNDYL YVETTE BANKS AND OCTAVIUS AVERY  
SMITH**

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## INTRODUCTION

The requirements of a time limited demand letter “at times can be a trap for the unwary, leading us to caution parties to avoid crossing the line from vigorous advocacy to gamesmanship.” *Pierce v. Banks*, No. A23A394, 2023 WL 4227923, at \*6 (Ga. App. June 28, 2023) (Dillard, J., concurring). (Exhibit A to the Petition). The efforts to avoid acknowledging a good faith acceptance of a time limited settlement should not be “cageyness for its own sake” but should be restricted to “detail-oriented advocacy.” *Id.* These settlement offers, which are really attempts to avoid an unequivocal acceptance of the offer, fail to comply with the requirement of candor and cooperation in the settlement of cases with lower insurance policy limits and large special damages. The case subject to this Petition for Certiorari is a case where the line marking vigorous advocacy was crossed by the Respondent.

The Georgia General Assembly acknowledged the gamesmanship problem in its passage of O.C.G.A. § 9-11-67.1. The version of this statute applicable to this date of accident provides for five material terms required in a pre-suit offer to settle a personal injury tort claim arising from use of a motor vehicle. The statute also provides acceptable methods of payment. An offeror may include terms of

acceptance in addition to those in the statute, but as the Court of Appeals alluded in its opinion, those terms “should not be unduly restricted.” *Id.* Practitioners request that this Court clarify when a mutual agreement between the parties has occurred. We respectfully request this Court grant the petition for writ of certiorari and provide that a standard of candor and reasonableness must be used to determine whether the offer complies with the statute and whether the acceptance conforms to the requirements of the offer.

**STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE***

The Georgia Defense Lawyers Association (“GDLA”) is an organization of Georgia lawyers whose primary practice is the defense of civil lawsuits. GDLA has over 1,000 members who practice in all parts of Georgia in a variety of practice settings. The members are diverse but share a common interest in supporting and improving the civil defense bar, improving the adversary system of jurisprudence, and assisting in improving the administration of justice.

GDLA submits this amicus curiae brief because this appeal presents important issues regarding the effect of O.C.G.A. § 9-11-67.1 and the acceptance of time-limited offers to settle for policy limits. A significant number of GDLA members represent persons on engagement by insurance companies and represent self-insured businesses. GDLA members routinely receive, and are required to respond to, time-limited policy limits demands such as the demand in this case.

The members of GDLA have a vested interest in the interpretation and application of O.C.G.A. § 9-11-67.1 and application of the law pertaining to additional terms in these offers. The issues raised in this Petition for Certiorari are of great importance to GDLA's members.

## **I. BASIS FOR THE PETITION**

Petitioners, Kyndyl Yvette Banks and Ocatvius Avery Smith, have applied for a writ of certiorari to the Court of Appeals pursuant to Rules 38 and 40 of the Rules of the Supreme Court of Georgia. The case involves a reversal by the Court of Appeals of the trial court's grant of a Petitioners' motion to enforce a settlement agreement.

## **II. JUDGMENT APPEALED**

On June 28, 2023, the Court of Appeals reversed the trial Court's Order granting Petitioners' Motion to Enforce Settlement. *Pierce v. Banks*, No. A23A394, 2023 WL 4227923 (Ga. App. June 28, 2023).

## **III. STATEMENT OF CASE AND FACTS**

Counsel for Respondent presented a time-limited offer to settle to the liability insurer's policy limits, pursuant to the pre-suit provisions of O.C.G.A.

§ 9-11-67.1.<sup>1</sup> (Exhibit B to the Petition). The time-limited, policy limits settlement offer at issue was actually Appellant’s second offer to Appellees, but the validity of the first offer is not in dispute for the purposes of the Petition. The offer was dated August 30, 2021. It was addressed to Appellees’ auto insurer, Trexis One Insurance Corporation (“Trexis”), through counsel for Petitioners. The offer included terms beyond those contained in the statute. *Id.*

In addition to the terms required by the applicable version of O.C.G.A. § 9-11-67.1, the demand letter included the follow terms:

1. Trexis must accept the terms of the offer in writing within 31 days.
2. “As an act necessary to accept this offer, payment must be *received* 15 days after Trexis’ written acceptance of this offer” at counsel’s office. (Emphasis added.)
3. “As an act necessary to accept this offer, the settlement payment and all documents sent by Trexis must not include any terms, conditions, descriptions, *expirations*, or restrictions not expressly permitted in this offer. (Emphasis added.)

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<sup>1</sup> The offer at issue in this case was made pursuant to the 2013 version of O.C.G.A. § 9-11-67.1.

4. “[T]his offer must be accepted exactly as stated and that any variance at all from the quoted language above, even if accidental, will be a rejection of this offer.
5. “If payment is made in a form that requires a payee, payment must be made to “Aaron Pierce and Brooks Injury Law, LLC.”

The offer letter from counsel for Respondents was received by counsel for Petitioners on September 2, 2021. Petitioners accepted the offer in a letter delivered on September 9, 2021, within the timeframe provided by Respondents. The acceptance stated that the insurer had authorized counsel to accept the terms of the offer “in its entirety.” (Exhibit E to the Petition). The written response enclosed a settlement check drawn on a Trexis commercial bank account payable to Respondent and Respondent’s law firm (as directed), as well as a proposed limited liability release. The settlement check states on its face that it is “VOID AFTER 180 DAYS.” Counsel for Respondents returned the letter, settlement check and release. Counsel for Respondents then advised that she did not consider the response sufficient to be an acceptance and that she believed that no settlement had occurred.

Respondent filed a lawsuit against Petitioners in the State Court of Athens-Clarke County. Petitioners asserted the defense of accord and satisfaction. Respondent filed a motion for summary judgment on the defense asserted.

Petitioners filed a motion to enforce settlement. On July 8, 2022 The Honorable Charles E. Auslander III entered an order granting the Petitioners' Motion to Enforce Settlement. On July 11, 2022 Judge Auslander entered a Final Judgment in favor of Petitioners. Respondents timely appealed the Final Judgment to the Court of Appeals. By a decision dated June 28, 2023, the Court of Appeals reversed the judgment of the trial court.

#### **IV. ENUMERATION OF ERRORS**

- A. The Court of Appeals erred in finding the parties did not have an agreement because the delivery of the settlement check and documents on September 9, 2021 did not comply with the requirement that the payment be received 15 days after written acceptance of the offer.
- B. The Court of Appeals erred in finding that the parties did not have an agreement because the settlement check with the language "VOID AFTER 180 DAYS" failed to comply with the terms of the offer and the statute.

#### **V. ARGUMENT AND CITATION OF AUTHORITY**

Settlement agreements are subject to the same rules regarding formation and enforceability as other contracts. *Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848, 797 S.E.2d 814 (2017). When determining whether a valid settlement agreement was reached between the parties, Georgia law favors compromise. *Progressive*

*Mountain Ins. Co. v. Butler*, 364 Ga. App. 439, 442, 875 S.E.2d 422, 426 (2022); *Cumberland Contractors, Inc. v. State Bank and Trust Co.*, 327 Ga. App. 121, 127, 575 S.E.2d 511, 518 (2014). The objective intent of the parties in responding to an offer must be considered in deciding whether an agreement was formed. *Hodge v. Parlor*, 365 Ga. App. 109, 111, 877 S.E.2d 655, 658 (2022). While an offer must be accepted unconditionally, the Georgia law regarding settlement agreements does not dictate that any variance from the offer, which does not alter the material terms of the agreement, must constitute a counter-offer. *See id.*; *Progressive Mountain Ins. Co.*, 364 Ga. App. 439, 442-43, 875 S.E.2d 422, 426 (2022); *Herring v. Dunning*, 213 Ga. App. 695, 698-99, 446 S.E.2d 199, 203 (1994).

**A. Timely Payment Complied with the Terms of the Offer.**

The Court of Appeals cites *Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848, 797 S.E.2d 814 (2017) for the proposition that prompt payment of the settlement may be required by the offeror. The Court then concludes that Petitioner failed to comply with offeror's requirement of payment "on the 15th day" after written acceptance. The Court's holding does not adequately address the reasonable interpretation of the language that is used in the offer, with which Petitioner complied, and takes for granted language omitted from the offer with which Petitioner did not comply.

Respondent argued that, under the Court's the holding in *de Paz v. de Pineda*, 361 Ga. App. 293, 864 S.E.2d 134 (2021), the early payment in this case must be deemed a failure to comply with the settlement offer. The reliance on *de Paz* is misplaced. In *de Paz*, the Court held that a settlement offer was not accepted by the insurer when the settlement check was not delivered to the offeror within the time required by the offer. *de Paz*, 361 Ga. App. at 293, 864 S.E.2d at 135. This failure to comply with a material term of the offer is not comparable to the circumstances in the case before the Court. While *de Paz* does state that the offeror has the ability to require receipt of payment to establish a settlement agreement under O.C.G.A. § 9-11-67.1, it does not follow that receipt of payment before the specified for receipt fails to establish a settlement agreement. The Court's holding in *de Paz* specifically contemplates payment must have been received "within the specified time period." *de Paz*, 361 Ga. App. at 293–96, 864 S.E.2d at 135–37. The Court of Appeals in this case relied on its holding in *de Paz*, to wrongfully conclude that it was "patent" that the Petitioner's purported acceptance did not comply with the terms of the offer. *Pierce v. Banks*, No. A23A394, 2023 WL 4227923, at \*3 (Ga. App. June 28, 2023).

Even if the Court's holding in *de Paz* were to be read as supporting Respondent's argument that, as the offeror, he can require payment to be delivered on a date certain, Respondent did not make payment *on* a date certain a term of the

offer. The letter states the payment must “be received 15 days after Trexis’ written acceptance”. The offer does not say *on the* 15th day after written acceptance. The Court of Appeals opinion erroneously concludes that this was the meaning of the language in the offer. *Id.* at \*4. The structure of Respondent’s offer, as written, reasonably provides only a limit as to when the payment must be in the hands of the offeror, rather than requiring delivery on the 15th day after written acceptance.

As the architect of the offer, Respondent cannot now rely on ambiguity in the language chosen to try to create a new term in the offer. *See Hodge v. Parlor*, 365 Ga. App. 109, 111-12, 877 S.E.2d 655 (2022). Respondent’s terms should be taken at face value. *See First Acceptance Ins. Co. of Ga. v. Hughes*, 305 Ga. 489, 493-94, 826 S.E.2d 71, (2019) (“Contractual language that is ‘plain unambiguous, and capable of only one reasonable interpretation’ must be afforded its literal meaning.”) (quoting *First Data POS v. Willis*, 273 Ga. 792, 794, 546 S.E.2d 781 (2001)). Any uncertainty or ambiguity in the language of the offer must be construed against the drafter. *See, e.g., Langley v MP Spring Lake, LLC*, 307 Ga. 321, 834 SE2d 800 (2019).

Respondent apparently rejects the plain meaning of “received” in asserting payment was not received 15 days after acceptance, but he does not provide any authority on how to otherwise interpret the word “received” as used in the offer. Appellant merely asserts that early delivery of payment was a rejection of the

offer. Respondent's argument presupposes that "received 15 days after written acceptance" has the same meaning as "delivered on the 15th day after written acceptance." As the trial court's order correctly states, Respondent's offer explicitly required payment be received by a certain date, not for the insurer to deliver payment on a certain date. Counsel for Respondent had received the settlement check upon delivery of the letter, check, and release. The offer opted for the passive description that payment "be received," implying that the action of receiving could occur at any time prior to the deadline imposed in the offer. Once one is in receipt of payment, it remains "received" until and unless returned. In keeping with the exact terms of the offer, the payment was received at all times after delivery of the settlement check, which included the 15th day after receipt of the letter accepting the offer.

While Respondent stated that no reasoning is required for justifying the terms of an offer, he purported to offer one. The ostensible reason is, however, a risible attempt at a fig leaf. Respondent points out that health insurance reimbursement claims are governed in part by Georgia's Medical Benefits Reimbursement Statute, which requires that the injured party's health insurer shall be provided notice of a settlement "no later than ten days prior to *consummation* of any settlement." O.C.G.A. § 33-24-56.1(g) (Emphasis added). Respondent argued that delivery of payment on the 15th day after acceptance, and not before, was

required to allow for timely notice to the health insurer under the reimbursement statute.

Respondent offered no authority showing that the date of delivery of the settlement check has any effect on compliance with this statute. No effort is made by Respondent to establish when a settlement is consummated. Rather, Respondent conflated consummation of a settlement with delivery of the settlement check. “Consummate” is defined as “[t]o bring to completion” or “to fulfill.” *Black’s Law Dictionary* (8th ed. 2004). A settlement is not consummated simply by delivering the settlement check. A settlement is consummated by execution by the Respondent of the settlement documents. *See American Oil Co. v. Studstill*, 230 Ga. 305, 305; 196 S.E.2d 847, 848 (1973). To ensure compliance with the reimbursement statute, the recipient of the settlement check can simply hold the check for the ten-day notice period or deposit the settlement check in a trust account during the notice period. After providing notice under the statute, the funds can disbursed and the settlement documents signed. This is the point at which the settlement has been consummated. Settlements of tort suits occur in just this way countless times a year in this State.

The special concurrence in the opinion of the Court of Appeals, reflecting the opinion of two of the three judges on the panel, accepts the Respondent’s “explanation” that delivery on the 15<sup>th</sup> day after acceptance of the offer was

*required* for compliance with the Medical Benefits Reimbursement Statute. *Pierce v. Banks*, No. A23A394, 2023 WL 4227923, at \*6 (Ga. App. June 28, 2023) (Dillard, J. concurring). The concurrence stated that this purported requirement was “thoroughly” explained by the Respondent. *Id.* Furthermore, it appears that this “explanation” by Respondent is what distinguished the Respondent’s behavior as “advocacy” rather than “gamesmanship.” *Id.* (citing *Resurgens, P.C. v Elliott*, 301 Ga. 589, 599 n.10, 800 S.E.2d 580, 587 (2017)). Reliance on this explanation by the special concurrence is misplaced. Delivery of the settlement on the 15<sup>th</sup> day after acceptance was not “required” for compliance with Respondent’s health insurance policy or the reimbursement statute. *See* O.C.G.A. § 33-24-56.1.(g)<sup>2</sup> (“When recovery for personal injury is sought...the person asserting the claim...shall provide notice of the *existence* of the claim...[n]o later than ten days prior to the consummation of any settlement...and shall include a request for information regarding the existence of any claim by a benefit provider.”) (emphasis added). Compliance with the notice requirement in the reimbursement statute is irrelevant to the delivery date of the settlement check. This provision of the reimbursement statute is overlooked by the Court of Appeals.

Based on the obvious, reasonable interpretation of Appellant’s offer, since

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<sup>2</sup> Incidentally, the statute also provides that reimbursement is only possible if “the amount of recovery exceeds the sum of all economic and noneconomic losses incurred as a result of the injury. O.C.G.A. § 33-24-56.1(b).

Appellant was required to have received payment on the 15th day after acceptance, payment made prior to that date was received timely. Appellees accepted the offer by timely delivering payment within the plain meaning of the term of the offer.

### **B. Payment by Bank Check Complied with the Terms of the Offer**

The Court of Appeals also concludes that Trexis did not choose an acceptable method of payment to comply with the offer. *Pierce v. Banks*, No. A23A394, 2023 WL 4227923, at \*5 (Ga. App. June 28, 2023). But O.C.G.A. § 9-11-67.1(f)(5) expressly permits the entity making payment to choose to pay by “bank check issued by an insurance company.” As the trial court correctly pointed out, the offeree did not impose any condition, expiration, or restriction as part of its acceptance of the offer. The check statement merely reflects the Georgia law, which provides that the payor is under no obligation to pay a check presented more than six months after the date of the check.

The Court of Appeals erroneously states that Petitioner “elected a payment method that, according to their arguments on appeal, could not have satisfied the terms of the offer.” *Id.* The opinion then lists other methods of payment that could have been used but disregards the fact that the payment provided was consistent with the requirements of the Respondent’s offer and O.C.G.A. § 9-11-67.1. The offeror here was not free to add a term that is inconsistent with the provision of

O.C.G.A. § 9-11-67.1(f)(5). But an offeror, by making a demand under the terms of this statute, was under an obligation to accept payment by an insurer's bank check. The Respondent in this case wrongfully attempts to avoid a settlement payment which is fully compliant with O.C.G.A. § 9-11-67.1(f)(5). The offeror attempts to impose a term of the offer which is inconsistent with the provision of the statute. This Court should take this opportunity to limit this unreasonable restriction on valid settlement payments in acceptance of an offer.

The law applicable to the settlement check drawn on an insurer's banks account authorizes the bank to refuse to pay the check if presented by the payee over 180 days after its date. It makes no difference that the bank prospectively states that payment will not be made on checks presented late. The Court of Appeals in this case seems to conclude that the Georgia law codifying time restrictions on checks is irrelevant because the payor *may* choose to pay a check presented after more than 180 days if done in good faith. *Pierce v. Banks*, No. A23A394, 2023 WL 4227923, at \*5 (Ga. App. June 28, 2023). The decision references the Official Comments of the Uniform Commercial Code, which provides instances where a bank might pay a late presented check. *Id.* However, the commentary relied on by the Court are not applicable to the facts of this case.

Respondent's refusal of the check on this basis is also disingenuous. If a payee is actually concerned about receiving payment within the 180-day time period, the settlement check could be negotiated and placed in a trust account. The same check could also be taken to the bank for replacement with a certified or cashier's check, which would not be subject to the 180-day provision. The statement on the face of the check does not render the settlement payment non-compliant with the permissible terms of the offer. Respondent required payment by bank check for the amount of \$25,000.00, and Petitioner provided exactly what was requested. The payment shows a clear intent to accept the offer in good faith, cooperation, and candor by the Petitioner. This Court should take this opportunity to hold practitioners presenting policy limits demands under O.C.G.A. § 9-11-67.1 to the same standard the Court of Appeals suggests is required in its opinion.

## **VI. CONCLUSION**

We respectfully request this Court grant the Petition for a Writ of Certiorari to provide clarification on this pressing issue for practitioners of the GDLA.

This 28th day of July, 2023.

**Georgia Defense Lawyers Association**

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*On Behalf of the Georgia  
Defense Lawyers Association*

**CERTIFICATE OF SERVICE**

In accordance with Georgia Court of Appeals Rule 6(b)(2), the undersigned hereby certifies that I have this day served counsel for all parties in this matter with a copy of the foregoing  
AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION  
("GDLA") IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF KYNDYL  
YVETTE BANKS AND OCTAVIUS AVERY SMITH by U.S. mail, with adequate postage for  
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This 28<sup>th</sup> day of July, 2023.

*/s/ N. Staten Bitting, Jr.* \_\_\_\_\_  
N. STATEN BITTING, JR.