IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

Case No. A24A1334

LAURA WADE SPENCER

Appellant,

vs.

KELLI LAMM,

Appellee.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Statutes **Page(s)**

Cases

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

The Georgia Defense Lawyers Association ("GDLA") is an association of more than 1,000 Georgia lawyers, including solo practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA offers its members a forum to discuss defense strategies, points of law, and emerging issues. Through this forum, the GDLA aims to elevate the standards of trial practice; to develop, establish, and secure court adoption or approval of a high standard code of trial conduct and courtroom manners; to support and work for the improvement of the adversary system of jurisprudence in our courts; to work for elimination of court congestion and delays in civil litigation; to promote the administration of justice; and to increase the quantity and quality of the service and contribution which the legal profession renders to the community, state, and nation.

The GDLA's attorneys practice in nearly every area of civil defense litigation and represent businesses in nearly every industry. In order to carry out its mission and represent the interests of its members' clients, the GDLA is committed to assisting the court by offering information and context which bear on significant cases.

The case currently before this Court of Appeals is one such significant case. The Georgia General Assembly enacted the 2021 version of O.C.G.A. § 9-11-67.1

against the backdrop of a large body of law confirming the "mirror image" rule applied in the context of settlement of tort claims. This rule holds that "an offeror is the master of his or her offer, and free to set the terms thereof" and may only be "accepted unequivocally and without variance of any sort." Knowing Georgia courts had repeatedly found the previous version of § 9-11-67.1 ineffective at abrogating this rule, the General Assembly amended the statute to more clearly restrict the terms which may be included in an offer to settle a tort claim prior to an answer being filed and detail how such an offer could be accepted.

Despite the clear limits on what terms may be in a pre-answer offer to settle under the 2021 version of § 9-11-67.1, plaintiffs' attorneys have routinely added additional terms to offers, in direct contradiction to the statute, in order to "set up" a bad faith failure to settle claim. Members of the GDLA have consistently faced this issue, and the GDLA has a significant interest in seeing O.C.G.A. § 9-11-67.1 enforced as intended by the Georgia General Assembly.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by this appeal is whether an enforceable settlement agreement was reached between the parties when State Farm Mutual Automobile Insurance Company ("State Farm"), the insurer for Appellant Laura Wade Spencer ("Appellant"), accepted the material terms of a settlement offer made by Appellee Kelli Lamm ("Appellee"). In its order denying Appellant's motion to enforce the

settlement, the trial court incorrectly interpreted O.C.G.A. § 9-11-67.1 (2021) and erroneously held common law principles applied to find that no enforceable agreement existed.

As discussed in more detail below, O.C.G.A. § 9-11-67.1 (2021) displaced the common law principles relied upon by the trial court, replacing them with a clear statutory scheme through which an offer governed by the statute can be made and accepted. Under § 9-11-67.1, an offer for settlement must contain **only** the statutorily defined material terms unless the offeror obtains prior written consent. A settlement is then formed when the recipient of the offer, here State Farm, accepts the material terms outlined in the statute in writing, notwithstanding Appellee's attempts to insert additional terms in an effort to force a rejection.

Because the trial court incorrectly interpreted O.C.G.A. § 9-11-67.1 (2021) in deciding the motion below, the Court should find the trial court erred. Applying the correct interpretation, the Court should affirm the judgment of the trial court on different grounds, finding Appellee failed to make a valid offer under O.C.G.A. § 9-11-67.1 because her offer included statutorily prohibited additional terms. Alternatively, if the Court finds Appellee's offer valid as to only the statutory material terms it included, it should reverse the trial court's order and find that, because State Farm provided unequivocal written acceptance of the offer, an enforceable settlement agreement exists.

ARGUMENT AND CITATION TO AUTHORITY

I. O.C.G.A. § 9-11-67.1 (2021) applies to this case.

Appellee will make the argument that O.C.G.A. § 9-11-67.1 (2021) does not apply to the offer of settlement in this case because the offer was made before a complaint was filed in the action below. This argument stems from a tortured and textually false reading of O.C.G.A. § 9-11-1 combined with O.C.G.A. § 9-11-3 and does not comport with the other provisions of the Civil Practice Act. Appellee will argue that the Civil Practice Act applies **only** when an action has been commenced by the filing of a complaint except for those statutes which specifically include activities occurring before the filing of an action. The problem with this reading is that it has no support in the text itself.

O.C.G.A. § 9-11-1 states that "[t]his chapter governs the procedure in all courts of record in this state in all actions of a civil nature whether cognizable as cases at law or in equity . . ." and that it "shall be construed to secure the just, speedy, and inexpensive determination of every action." It further states that the "chapter shall also apply to courts which are not courts of record to the extent that no other rule governing a particular practice or procedure of such courts is prescribed by general or local law applicable to such courts." O.C.G.A § 9-11-1. Read cohesively, § 9-11-1 does not place a limit on **when** the Civil Practice Act

applies but **where** it applies—i.e. "all courts of record" and, if no other rule is given, "courts which are not courts of record." Id.

Further, nothing in the statute contemplates that a provision of the Civil Practice Act may alter the scope of the chapter by its own language. Appellee reads this language into § 9-11-1 because it is necessary for the coherency of her argument. If this non-textual exception is **not** read into § 9-11-1, then O.C.G.A. § 9-11-27(a) **alone** defeats her argument, as that provision specifically governs procedures prior to the filing of an action. However, if Appellee's argument were correct, the entirety of the Civil Practice Act would be read to imply that all of the procedures, unless otherwise specified, necessarily occur after the commencement of an action. If that were true, no provision in the Civil Practice Act would have to specify that it applies **after commencement of an action**. Nevertheless, **multiple** provisions of the Civil Practice Act indeed specify that they apply after the commencement of an action. See, e.g., O.C.G.A. § 9-11-14(a) ("**At any time after commencement of the action** a defendant, as a third-party plaintiff, may cause a summons and complaint to be served . . . .") (emphasis added); O.C.G.A § 9-11-31(a)(1) ("**After commencement of the action**, any party may take the testimony of any person . . . by deposition upon written questions.") (emphasis added); O.C.G.A. § 9-11-33(a)(1) ("Interrogatories may, without leave of court, be served upon the plaintiff **after commencement of the action** . . . .") (emphasis added);

O.C.G.A. § 9-11-34(b)(1) (stating requests for production "may, without leave of court, be served upon the plaintiff **after commencement of the action** . . . .") (emphasis added); O.C.G.A. § 9-11-36(a)(1) (stating requests for admission "may, without leave of course, be served upon the plaintiff **after commencement of the action** . . . .) (emphasis added). If Appellee's argument that O.C.G.A. § 9-11-1 implies that the Civil Practice Act is only applicable after the filing of an action, all of its **many provisions** specifying that they apply after commencement of an action are redundant and surplusage to the statutes. "And it is well settled that in interpreting statutory text, 'courts generally should avoid a construction that makes some language mere surplusage.'" Camden Cnty. v. Sweatt, 315 Ga. 498, 509, 883 S.E.2d 827 (2023) (quoting Middleton v. State, 309 Ga. 337, 342, 846 S.E.2d 72 (2020)).

A full reading of the provisions of the Civil Practice Act, including those which specify whether a procedure can be used before or after the commencement of an action, demonstrates that the commencement of an action is a point in time which the rest of the act references. To that end, O.C.G.A. § 9-11-3, specifying that "[a] civil action is commenced by filing a complaint with the court"—as opposed, for example, to the service of that complaint or some other act—is a reference point in time for the rest of the Civil Practice Act, not a limiting factor as to when the act's provisions apply.

Additionally, O.C.G.A. § 9-11-67.1(h) states that the statute "shall apply to **causes of actions** for personal injury, bodily injury, and death arising from the use of a motor vehicle on or after July 1, 2021." If § 9-11-67.1 only applied where an action had been commenced by the filing of a complaint, subsection (h) would read that it applies to **actions** filed on or after July 1, 2021. By specifying that it applies to **causes of actions**, subsection (h) demonstrates that the statute applies **before** a formal action is filed, as the cause of action accrues when the injury occurs.

Accordingly, nothing in the text of O.C.G.A. § 9-11-67.1 holds, either explicitly or implicitly, that the statute does not apply unless and until a complaint is filed and an action is commenced. As intended by the Georgia General Assembly, O.C.G.A. § 9-11-67.1 applies to the settlement demand at issue in this case.

II. The trial court erred in misinterpreting O.C.G.A. § 9-11-67.1 (2021) and applying the common law principles articulated in Grange Mutual Casualty Co. v. Woodard in determining whether an enforceable settlement agreement exists.

The trial court erred in misinterpreting O.C.G.A. § 9-11-67.1 (2021) and applying common law principles in evaluating Appellant's motion to enforce settlement. In its order, the trial court, after noting that § 9-11-67.1 governed, went on to apply the common law principles outlined the applicable law to include the Georgia Supreme Court's decision in Grange Mutual Casualty Co. v. Woodard, 300 Ga 848, 797 S.E.2d 814 (2017). (V.2/R.9-10.) The trial court relied on

Woodard to assert that "Section 9-11-67.1 does not expressly or by implication contravene common law principles" meaning "it remains that the offeror is 'the master of his or her offer, and free to set the terms thereof.'" (V.2/R.7 (quoting Woodard, 300 Ga. at 853-54, 856).) The trial court specifically applied common law principles, stating the applicable law held that "failure to comply with the precise terms of an offer is generally fatal to the formation of a valid contract" and "if an offer calls for an act, it can be accepted only by the doing of the act." (Id. (quoting Pierce v. Banks, 268 Ga. App. 496, 500, 890 S.E.2d 402 (2023).)

Despite acknowledging the decision in Woodard was based on the previous 2013 version of the statute, the trial court found the 2021 revisions to the statute were nothing more than "an expansion of the period during which the statute would apply," focusing only to the change in § 9-11-67.1(a) from "prior to the filing of a civil action" to "prior to the filing of an answer." (V.2/R.9-10.)

Though the trial court accurately recounts the Woodard court's interpretation of the 2013 version of § 9-11-67.1, it downplays the breadth of the 2021 revisions to the statute. The 2013 statute in effect at the time read, in relevant part:

> (a) Prior to the filing of a civil action, any offer to settle a tort claim for personal injury, bodily injury, death arising from the use of a motor vehicle and prepared by or with the assistance of an attorney on behalf of a claimant or claimants shall be in writing and contain the following material terms:

(1) The time period within which such offer must be accepted, which shall be not be less than 30 days from receipt of the offer;

(2) Amount of monetary payment;

(3) The party or parties the claimant or claimants will release if such offer is accepted;

(4) The type of release, if any, the claimant or claimants will provide to each releasee; and

(5) The claims to be released.

(b) The recipients of an offer to settle made under this Code section may accept the same by providing written acceptance of the material terms outlined in subsection (a) of this Code section in their entirety.

O.C.G.A. § 9-11-67.1 (2013).

Following the Georgia Supreme Court's decision in Woodard, the Georgia General Assembly amended § 9-11-67.1, which went into effect on July 1, 2021. See O.C.G.A. § 9-11-67.1(h) (2021); 2021 Georgia House Bill No. 714, Georgia One Hundred Fifty-Sixth General Assembly – 2021-2022 Regular Session. Rather than the limited revision suggested by the trial court's order, the above-cited subsections were amended as follows:

(a) Prior to the filing of ~~a civil action~~ **an answer**, any offer to settle a tort claim for personal injury, bodily injury, death arising from the use of a motor vehicle and prepared by or with the assistance of an attorney on behalf of a claimant or claimants shall be in writing ~~and contain the following material terms~~:

(1) Shall contain the following material terms:

~~(1)~~(A) The time period within which such offer must be accepted, which shall be not be less than 30 days from receipt of the offer;

~~(2)~~(B) Amount of monetary payment;

~~(3)~~(C) The party or parties the claimant or claimants will release if such offer is accepted;

~~(4)~~(D) The type of release, if any, the claimant or claimants will provide to each releasee; and

~~(5)~~(E) The claims to be released~~.~~**;**

(2) Shall include medical or other records in the offeror's possession incurred as a result of the subject claim that are sufficient to allow the recipient to evaluate the claim; and

(3) May include a term requiring that in order to settle the claim the recipient shall provide the offeror a statement, under oath, regarding whether all liability and casualty insurance issued by the recipient that provides coverage or that may provide coverage for the claim at issue has been disclosed to the offeror.

(b) **(1) Unless otherwise agreed by both offeror and the recipients in writing, the terms outlined in subsection (a) of this Code section shall be the only terms which can be included in an offer to settle made under this Code section.**

(2) The recipients of an offer to settle made under this Code section may accept the same by providing written acceptance of the material terms outlined in subsection (a) of this Code section in their entirety.

Compare O.C.G.A. § 9-11-67.1(a)–(b) (2021) with O.C.G.A. § 9-11-67.1(a)–(b) (2013) (additional language in bold and repealed language struck through).

Moreover, this Court has already acknowledged that, under the 2021 version of § 9-11-67.1, the decision in Woodard no longer remains valid, holding that under the new statute, "a pre-suit offer to settle is limited to the five identified material terms and parties may no longer add other terms unless mutually agreed upon." Anderson v. Jones, 365 Ga. App. 493, 496 n.4, 879 S.E.2d 119 (2022) (citing O.C.G.A. § 9-11-67.1(b)(1) (2021)).

Because the trial court erroneously interpreted the 2021 version of O.C.G.A § 9-11-67.1 to allow for the common law principles from Woodard to apply, it committed clear error.

III. The trial court erred in holding State Farm agreed to the additional terms in the offer under O.C.G.A. § 9-11-67.1 (2021).

The trial court erred in finding that, despite § 9-11-67.1's clear prohibition on additional terms in a pre-suit offer unless written agreement is given before the offer is made, State Farm agreed to the inclusion of such terms in its attempt to accept the offer. Not only does such a holding defy the clear meaning of § 9-11-67.1, it defies logic. The trial court's decision holds that, despite not reaching an enforceable settlement agreement based on State Farm's failure to properly accept these additional terms, State Farm nevertheless agreed to those terms—in its attempt to accept the offer in good faith—such as to waive the protections of § 9-11-67.1. Under this reasoning, State Farm both rejected and accepted the additional terms of the offer. This position is untenable.

A. § 9-11-67.1(b) requires written agreement to the inclusion of additional terms before an offer is made.

The trial court strains the language of § 9-11-67.1 to reach its conclusion. Subsection (b)(1) plainly states that only those terms outlined in subsection (a) may be included in an offer unless otherwise agreed by both parties in writing. The only reading of this subsection is that agreement for the inclusion of additional terms must be reached **before** an offer is made. Interpreting subsection (b)(1) to allow an offer to include additional terms which can then be agreed to in writing—without accepting the offer—defies the plain language of the statute. Such an offer would be in violation of § 9-11-67.1 when it is made under this type of scenario and would still set up the insurer for a bad faith action, which was the criticism of the previous version of the statute.

The 2021 version of § 9-11-67.1 was enacted against the backdrop of the Supreme Court's holding in Woodard, as well as the large body of "litigation over, among other things, what constitutes an offer to which an insurer must respond, when an insurer's inquiry about medical liens amounts to a counteroffer, and how much time an offeror must provide for a response in order to trigger an insurer's duty to respond." 300 Ga. at 856-57 (internal citations omitted). Though the Woodard court acknowledged that the 2013 version of § 9-11-67.1 was enacted to address these issues, it ultimately found that the statute did not go far enough to preempt common law contract principles. Id. at 853-58.

As noted by at least one judge on this Court, the construction of the 2013 version of § 9-11-67.1 still permitted plaintiffs' attorneys to "set up insurers for bad faith claims" by "structur[ing] offers not to reach settlements, but rather to elicit rejections." Wright v. Nelson, 358 Ga. App. 871, 877-79, 856 S.E.2d 421 (2021) (McFadden, C.J., concurring) (citations omitted). The trial court's interpretation of the 2021 version of the statute ignores the clear intention of the General Assembly intended when it revised § 9-11-67.1 to eliminate the type of gamesmanship demonstrated in this case.[1]

When interpreting a statute, the Court "must presume that the General Assembly had full knowledge of the existing state of the law and enacted the statute with reference to it." In Interest of M.D.H., 300 Ga. 46, 53, 793 S.E.2d 49 (2016) (quoting Chase v. State, 285 Ga. 693, 695-96, 681 S.E.2d 116 (2009)). The Court further must "presume that the General Assembly meant what it said and said what it meant." McBrayer v. Scarbrough, 317 Ga. 387, 393, 893 S.E.2d 660 (2023) (quoting Patton v. Vanterpool, 302 Ga. 253, 254, 806 S.E.2d 493 (2017)). The statutory text must therefore be afforded "its plain and ordinary meaning, . . .

[1] It cannot be seriously disputed that the goal of the settlement offer sent by Appellee was not to reach a binding settlement, but rather, to ensure that the demand would be rejected. If Appellee's intent was to accept the policy limits to settle their claims against Appellant, they could have simply done so.

view[ed] in the context in which it appears, and . . . read . . . in its most natural and reasonable way, as an ordinary speaker of the English language would." Id.

Courts are also cautioned against construing a statute in such a way "that makes some language mere surplusage." Camden Cnty. v. Sweatt, 315 Ga. 498, 509, 883 S.E.2d 827 (2023) (quoting Middleton v. State, 309 Ga. 337, 342, 846 S.E.2d 73 (2020)); see also Austin v. State, 356 Ga. App. 839, 845, 849 S.E.2d 689 (2020) ("Finally, we are also mindful of our duty to construe statutes to give sensible and intelligent effect to all of their provisions and to refrain from any interpretation which renders any part of the statutes meaningless.") (citation omitted).

This Court has already noted that, under the 2021 version of § 9-11-67.1, "a pre-suit offer to settle is limited to the five identified material terms and parties may no longer add other terms unless mutually agreed upon." Anderson, 365 Ga. App. at 496 n.4 (citing O.C.G.A. § 9-11-67.1(b)(1) (2021)). Subsection (b)(1) states that the "only terms" an offer under § 9-11-67.1 may include are those "outlined in subsection (a)," "[u]nless otherwise agreed by both the offeror and the recipients in writing." O.C.G.A. § 9-11-67.1(b)(1). Because this subsection discusses what an offer can include, the most natural reading of this language would be that the offeror and recipients must agree in writing that additional terms can be included in the offer **before** the offer is made. See McBrayer, 317 Ga. at

393 (citing Patton, 302 Ga. at 254). This subsection necessarily implies some sort of negotiation and agreement to additional terms in an offer prior to the offer being officially served.

In fact, not only is it the most natural and reasonable reading, but the only meaningful reading of subsection (b)(1) requires written agreement for the inclusion of additional terms **before** the offer is made. First and foremost, any offer made with additional terms prior to agreement to those terms would be—from its very inception—in violation of § 9-11-67.1. Such a circumstance would cut against a plaintiff's interest who, in good faith, wishes to settle and in favor of an insurer, genuinely acting in bad faith, who does not wish to settle based on its own interests. If the good faith plaintiff serves an offer in violation of § 9-11-67.1 on a bad faith insurer, the insurer could, by statute, disclaim the validity of such an offer because it violates § 9-11-67.1.

Second, if this subsection were read to mean additional terms can be included in an offer so long as they are agreed to in a subsequent acceptance, the 2021 amendment has no meaning because it would change nothing from the Woodard interpretation of the previous version of the statute. If the General Assembly is presumed to have "full knowledge of the existing state of the law and enacted the statute with reference to it," then the General Assembly knew the Supreme Court in Woodard had interpreted the previous version of § 9-11-67.1 to

allow additional terms to be included in an offer without prior agreement. In Interest of M.D.H., 300 Ga. at 53; Woodard, 300 Ga. at 853-58. If subsection (b)(1) allowed for the inclusion of additional terms as long as the recipient later agreed to those terms in writing, the amendment would allow the same type of offers allowed under the Woodard decision.

Third, construing subsection (b)(1) to allow offers with additional terms as long as they are later accepted by the recipient would render subsection (c) as "mere surplusage." Camden Cnty., 315 Ga. at 509. This subsection states that "[n]othing in this Code section is intended to prohibit parties from reaching a settlement agreement in a manner and under terms otherwise agreeable to both the offeror and recipient of the offer." O.C.G.A. § 9-11-67.1(c). If subsection (b)(1) allows any term to be included in an offer as long as there is an ex post written acceptance, then subsection (c) is not needed in the statute and is "mere surplusage" because there would be no reason to believe those agreements would not invalid under the other subsections of the statute. Camden Cnty., 315 Ga. at 509.

Further, because the inclusion of additional terms in an offer has been the device employed by plaintiff's attorneys to "set up" insurers for bad faith actions and was a basis of criticism for the 2013 version of § 9-11-67.1, the General Assembly is presumed to know this criticism, and it can be justly inferred that the

amendments to the statute was meant to prevent offers poisoned by additional terms in order "to elicit rejections." Wright, 358 Ga. App. at 877-79 (McFadden, C.J., concurring) (citations omitted); see also In Interest of M.D.H., 300 Ga. at 53 (stating courts "must presume that the General Assembly had full knowledge of the existing state of the law and enacted the statute with reference to it") (citation omitted). If an **ex-post** agreement to the inclusion of terms **already included** is sufficient to **retroactively** satisfy the statute, there is no limitation placed on offers under § 9-11-67.1, particularly under the trial court's analysis, in which the offer is said to have **rejected** yet its terms were agreed to so as to comply with subsection (b)(1).

Therefore, the only permissible reading of subsection (b)(1) is that additional terms can only be included in an offer governed by § 9-11-67.1 when the parties have agreed in writing that they may be included **before** the offer is made. If subsection (b)(1) is given this proper construction, subsection (c) confirms that any agreement reached through an offer—made with proper ex ante written agreement—containing terms that vary from those required by § 9-11-67.1 are valid.[2]

[2] Additionally, if subsection (c) were to be given the meaning that the parties are free to reach an agreement with additional terms regardless of the requirements of subsections (a) and (b), the preceding subsections would then be rendered "mere surplusage." Camden Cnty., 315 Ga. at 509.

In sum, O.C.G.A. § 9-11-67 provides that an offer made under the statute—like the offer at issue here—can **only** contain the terms outlined in subsection (a) of the statute **unless** written agreement for the inclusion of additional terms in the offer is obtained **before** the offer is made. O.C.G.A. § 9-11-67.1(b)(1).[3]

B. Even if O.C.G.A. § 9-11-67.1 allowed additional terms included without prior agreement to be agreed to after they are included, the trial court's ruling that Appellant both agreed to those terms being in the offer while at the same time rejecting the offer is untenable.

Under the trial court's analysis, which allows for the inclusion of extra-statutory terms so long as there is ex post agreement to those terms, State Farm both rejected those terms—along with the rest of Appellee's offer—while simultaneously agreeing to them so as to retroactively transform the invalid offer under O.C.G.A. § 9-11-67.1 into an offer which complies with the statute. In effect, the trial court held that an agreement to additional terms existed when no agreement was reached by the parties. Put differently, the trial court purports to construe and apply the terms of a contract despite finding there is no contract.

Even assuming arguendo such a position could be taken, State Farm's letter agreeing to all the additional terms of Appellee's offer does not alone satisfy

[3] While this might seem impractical, there was no need for Appellee to insert additional terms in the demand if her only intent was to effectuate a settlement. The additional terms were injected with the sole purpose of eliciting a rejection in order to set up a bad faith action. Had Appellee wished to add additional terms, rather than attempt to force a rejection, she could have negotiated such terms with Appellant.

subsection (b)(1)'s requirement that "agreed by both the offeror and the recipients in writing." O.C.G.A. § 9-11-67.1(b)(1). Appellee must **also** agree in writing to these terms, and Appellee's insistence that these additional terms must be accepted through **acts**, instead of in **writing**, means there is no meeting of the minds between the parties regarding whether State Farm's written acceptance of the terms is sufficient. Therefore, even if State Farm could have been said to have agreed to terms that it simultaneously rejected, Appellee never agreed to those terms being agreed to or accepted in writing as State Farm intended. Therefore, the parties did not agree to the form of the terms, and no mutual agreement existed. Accordingly, even under the trial court's misguided reading of O.C.G.A. § 9-11-67.1 (2021), Appellee's offer did not comply with the statute.

IV. The trial court, under a correct interpretation of O.C.G.A. § 9-11-67.1 (2021), should have found either that no settlement agreement exists because Appellee failed to make a valid offer or that a settlement agreement exists because State Farm accepted all material terms under subsection (a) in writing.

An application of O.C.G.A. § 9-11-67.1 (2021) to the facts as presented below creates two possibilities: (1) Appellee failed to make a valid offer under § 9-11-67.1(b)(1) and therefore no settlement agreement exists; or (2) State Farm accepted in writing all required material terms and therefore, pursuant to § 9-11-67.1(b)(2), an enforceable agreement as to the material terms of subsection (a) exists.

A. Appellee failed to make a valid offer under § 9-11-67.1(b)(1) and therefore no settlement agreement exists.

If no enforceable settlement agreement exists, it is because Appellee failed to comply with O.C.G.A. § 9-11-67.1(2021) and therefore presented State Farm with an invalid offer. As discussed above, see supra Part III, the plain and ordinary meaning of § 9-11-67.1(b)(1) requires an offer governed by that statute to contain "**only**" those "terms outlined in subsection (a)" unless the parties have agreed in writing to the inclusion of additional terms. O.C.G.A. § 9-11-67.1(b)(1) (emphasis added).

As explained in more detail above, O.C.G.A. § 9-11-67.1 applies to the offer in this case. See supra Part I. To the extent Appellee argues the language in their offer asserting that the offer controls over § 9-11-67.1 exempts it from complying with the statute, § 9-11-67.1 governs whether that term is a valid term of the offer and any resulting settlement agreement.

It is beyond dispute that Appellee's offer in this action included terms beyond those outlined in § 9-11-67.1(a). It is also beyond dispute that Appellee did not obtain either Appellant's or State Farm's prior written agreement for the inclusion in the offer of additional terms beyond those outlined in subsection (a). Appellee's offer therefore violated subsection (b)(1) because it did not include "**only**" those "terms outlined in subsection (a)" where there is no written

agreement to the inclusion of additional terms.[4] O.C.G.A. § 9-11-67.1(b)(1) (emphasis added).

Though the statute explicitly prohibits additional terms not previously agreed upon, it is silent as to whether a noncompliant offer is an invalid offer incapable of being accepted or whether the included material terms of subsection (a) may still be accepted to form an enforceable settlement agreement based on only those terms.

Because the offer in this case specifically states that the terms of the offer apply over § 9-11-67.1, the Court could rightly find that, because the offer fails to comply with the statute and attempts to deny its application, it is an invalid offer under § 9-11-67.1 and is incapable of being accepted. As such, the Court could affirm the decision of the trial court on different grounds, finding that Appellee failed to serve a valid offer under O.C.G.A. § 9-11-67.1 (2021)—and not that State Farm rejected the purported offer—and therefore no settlement agreement exists.[5]

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[4] If the Court adopts the circular holding of the trial court that an attempted acceptance of an offer including additional terms serves as agreement to the inclusion of those non-conforming terms which are then found to be rejected, then State Farm's attempted acceptance still does not retroactively make Appellee's offer valid because Appellee did not agree to the manner of State Farm's acceptance.

[5] Though it may appear at first glance that which part of the contract—the offer or the acceptance—fails is immaterial as long as the same judgment is reached, it is the offer that is used to "set up" insurers "not to reach settlements, but rather to elicit rejections." Wright, 358 Ga. App. at 877-79 (McFadden, C.J., concurring) (citations omitted). An invalid offer has an impact on the legal positions of the parties as the litigation continues. See First Acceptance Ins. Co. of Georgia, Inc. v. Hughes, 305 Ga. 489, 492-93, 826 S.E.2d 71, 75 (2019) ("[A]n insurer's duty to settle arises when the injured party presents a valid offer to settle within the insured's policy limits.") (emphasis added and citations omitted). If Appellee's intent was to accept the

B. State Farm, on behalf of Appellant, accepted the material terms of the offer, as established by O.C.G.A. § 9-11-67.1(a), and therefore a settlement agreement exists pursuant to § 9-11-67.1(b)(2).

If the Court were to find that Appellee's offer is valid to the extent it includes the material terms outlined by subsection (a), State Farm, on behalf of Appellant, accepted Appellee's offer by accepting these terms in writing and therefore an enforceable settlement agreement exists.

Subsection (a) requires five material terms be included in an offer of settlement under § 9-11-67.1: (1) the time period for acceptance; (2) the monetary amount; (3) the party to be released; (4) the type of release; and (5) the claims to be released. O.C.G.A. § 9-11.67.1(a)(1). Appellee's offer provided the following terms: (1) acceptance must be within 31 days; (2) the settlement amount is $25,000.00; (3) the party to be released is Appellant, Laura Wade Spencer; (4) Appellee would execute a limited release; and (5) the claims to be released are "the bodily injury claims of Kelli Lamm that were caused by a collisions on August 21, 2021, except to the extent that other insurance is available that covers any claims for the bodily injuries of Kelli Lamm." (V.2/R.83.) State Farm was additionally asked, pursuant to § 9-11-67.1(a)(3), to provide an affidavit of no other insurance and to provide an insurance statement under oath. (Id.)

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policy limits (which State Farm clearly offered to pay) in order to settle their claim against Appellant, there would have been no lawsuit and, thus, no appeal.

State Farm sent Appellee's attorney a letter conveying "its unequivocal acceptance of [Appellee's] June 2, 2022 Offer of Compromise on behalf of Kelly Lamm in its entirety . . . ." (V.2/R.90.) Under O.C.G.A. § 9-11-67.1(b)(2)—which states an offer under this statute "may [be] accept[ed] . . . by providing written acceptance of the material terms outlined in subsection (a) of this Code section in their entirety"—State Farm's letter accepted the statutory material terms in Appellee's offer and formed an enforceable settlement agreement as to those terms.[6]

Accordingly, if the Court finds Appellee's offer—minus the statutorily prohibited additional terms—survives as a valid offer based on the material terms allowed by § 9-11-67.1(a), then it should reverse the trial court's order and find an enforceable settlement exists.

CONCLUSION

For the foregoing reasons, the GDLA, as *amicus curiae*, respectfully submits that the trial court's decision should be reversed because the trial court incorrectly applied O.C.G.A. § 9-11-67.1 (2021). If this Court affirms the trial court's ruling based on the reasoning in the order entered below, then the 2021 revisions to O.C.G.A. § 9-11-67.1 would be rendered meaningless. Instead, as discussed

[6] An offer governed by the statute may be accepted "by providing written acceptance of the material terms outlined in subsection (a) . . . in their entirety." O.C.G.A. § 9-11-67.1(b)(2).

above, the Court should affirm the judgment of the trial court on different grounds, finding that there was no rejection of the offer because Appellees failed to make a valid offer under O.C.G.A. § 9-11-67.1 (2021) as the offer here included statutorily prohibited additional terms. In the alternative, the Court should reverse the trial court's order and find that, because State Farm provided unequivocal written acceptance of the material terms of the offer as established by O.C.G.A. § 9-11-67.1(a), an enforceable settlement agreement exists.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 16th day of May, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** upon all counsel of record by depositing a copy of the same in the United States Mail, postage pre-paid, addressed to the following counsel of record:

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