**IN THE COURT OF APPEALS**
**FOR THE STATE OF GEORGIA**

**Case No. A21A1134**

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**ENEDIA TRUJILLO DE PAZ**

**Appellant,**

**vs.**

**ANA ALBERTO DE PINEDA**

**Appellee.**

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# AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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On Behalf of the Georgia Defense Lawyers Association

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## IDENTITY AND INTEREST OF AMICUS CURIAE

The Georgia Defense Lawyers Association ("GDLA") is an association of approximately 950 Georgia lawyers, including sole practitioners and lawyers in law firms of all sizes, who engage in litigation, primarily for defendants in civil litigation, and represent insurance companies, individuals, and self-insured corporations. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise improving the administration of justice.

The GDLA and its members are interested in ensuring that basic principles of insurance law, contract law, and tort law are clearly defined and uniformly applied. It is axiomatic that legal systems are intended to provide a level of certainty and predictability so that individuals and businesses can shape their conduct appropriately. Ensuring predictability, fairness, and reasonableness in the making of settlement demands and the enforcement of settlement agreements is of key importance to all persons and companies involved in litigation of civil matters in Georgia courts. Almost every settlement or purported settlement of a litigated civil matter will involve a client of a member or potential member of the GDLA.

The GDLA submits this amicus brief in support of Appellee in this matter to demonstrate the trial court's Order enforcing the settlement agreement between the

parties should be affirmed. Because the GDLA's members regularly represent defendants and insurance companies in civil litigation (and regularly advise both insureds and insurers regarding settlement of liability claims), the GDLA has a vested interest in having this Court provide clarity and guidance on the formation and enforcement of settlement agreements.

The GDLA respectfully submits that where an insurer undertakes all acts within its control in order to satisfy the conditions presented in a settlement offer, such evidence demonstrates a meeting of the minds between the contracting parties and supports a finding of the formation of a valid and enforceable settlement contract. Affirmance of the trial court's Order will result in certainty in the law and for parties engaged in settlement negotiations. On the other hand, reversal of the trial court's Order would lead to unintended consequences, would allow the acts of an uninterested stranger to the negotiations to dictate whether a binding settlement agreement was formed and, most critically, would harm the interests of both insurers and insureds in this state. The public policy of this state of encouraging settlement of disputes is of critical importance and should be furthered. Affirming the creation of a settlement contract where all conditions were satisfied, and evidence exists showing a clear meeting of the mind furthers such a public policy.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by this appeal is whether a binding settlement is reached when an insurance company unequivocally accepts a settlement demand presented to its insured and yet, due to the actions of a third party, one of the so-called "conditions" of the demand is not met. The answer, GDLA respectfully submits, is yes. GDLA takes no position as to whether delivery of the settlement funds by a certain deadline is a valid condition of acceptance of the demand. But even if that could be a valid condition, the record here shows that Appellee's insurer, State Farm, did everything within its power to meet this condition.

Appellant Enedin Trujillo De Paz's time limited demand, sent pursuant to O.C.G.A. § 9-11-67.1, included a laundry list of conditions, terms and requirements, the only purpose of which was "not to reach settlement[], but rather to elicit rejection[]." Wright v. Nelson, 358 Ga. App. 871 (2021) (McFadden, J., concurring). There is no question that State Farm, the insurer for Appellee Ana Alberto Pineda, intended to accept the demand and pay its full policy limits to settle the claims against its insured. But, due to an issue caused by a third-party mail carrier, the settlement funds were not delivered within a deadline De Paz had included as a purported term of the settlement. When De Paz believed one of the terms was not satisfied, De Paz subsequently deemed the offer rejected and refused to move forward with settlement, an all too common factual scenario. What is strikingly different about this case, however, is that State Farm undertook every act within its

power to comply with each and every condition imposed by De Paz, thereby evidencing a total meeting of the minds on all essential terms of the settlement offer and demonstrating the existence of an enforceable settlement agreement.

By using a mail service that would guarantee delivery before the deadline imposed by De Paz—UPS overnight delivery—there can be no doubt State Farm manifested its assent to De Paz's "condition" regarding delivery of the settlement funds, thereby forming an enforceable settlement agreement. Georgia's public policy favoring settlement and resolution of disputed claims would be eroded if a settlement agreement could be thwarted where both parties intend to enter into an agreement and there is a meeting of the minds as to what is required, and one condition is not satisfied solely due to the conduct of a stranger to the agreement. The trial court correctly determined the parties entered into an enforceable settlement agreement and that Order should be affirmed.

## ARGUMENT AND CITATION TO AUTHORITY

### I. The trial court did not err in enforcing the settlement agreement because there was an unequivocal meeting of the minds between the parties and State Farm undertook all acts within its control to comply with the conditions imposed.

Ms. De Pineda's settlement offer cannot be viewed solely in the context of the former O.C.G.A. § 9-11-67.1 and instead must be viewed "against the backdrop of a large body of law on contract formation generally and settlement formation specifically." Grange Mut. Cas. Co. v. Woodard, 300 Ga. 848, 852 (2017); Stacey

v. Jones, 230 Ga. App. 213, 215 (1998) (noting "an agreement alleged to be in settlement and compromise of a ending lawsuit must meet the same requisites of formation and enforceability as any other contract" (citations omitted)). A valid settlement agreement exists if there is evidence of "parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. § 13-3-1.

Neither party has argued that there was a lack of capacity to contract, that there was a lack of consideration, or that the subject matter of the settlement contract was inappropriate. Thus, the only question regarding the formation of a valid and enforceable settlement agreement presented by De Paz is whether there was a meeting of the minds on the specific condition of receipt of payment within ten days of acceptance of the settlement offer. In the context of the enforceability of a settlement agreement specifically, this Court has held:

> In determining if parties had the mutual assent or meeting of the minds necessary to reach agreement, courts apply an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestation of assent. In making that determination, the circumstance surrounding the making of the contract, such as correspondence and discussions, are relevant in deciding if there was a mutual assent to an agreement, and courts are free to consider such extrinsic evidence.

Hansen v. Doan, 320 Ga. App. 609, 612-613 (2013) (citations omitted). Such a rule dovetails with the more general public policy of this state which favors settlement, with the limitation to settlement terms "upon which *the parties themselves have mutually agreed*. Absent such mutual agreement, there is no enforceable contract as between the parties." Benton v. Gailey, 334 Ga. App. 548, 550 (2015) (citing Imerys Clays, Inc. v. Washington County Bd. Of Tax Assessors, 287 Ga. App. 674, 675 (2007) (emphasis added)). See also Herring v. Dunn, 213 Ga. App. 695, 696-697 (1994).

A meeting of the minds exists in this case and the settlement agreement should be enforced. State Farm timely accepted the settlement offer and undertook all acts *within its control* to ensure the settlement check was delivered in the timeframe provided by the settlement demand. Specifically, State Farm selected a mail delivery service for the settlement check which would ensure the check's delivery to De Paz well within the deadline identified. These facts show State Farm's assent to De Paz's requirement that the settlement funds be received within ten days of acceptance, and demonstrate a meeting of the minds between the parties. This is not a case where the insurer incorrectly addressed the envelope for the settlement check, included the wrong names on the settlement check or carelessly missed a deadline. Instead, it is undisputed that the *only* reason the settlement check was not delivered within De Paz's deadline was because of the unforeseeable (and unfortunate) conduct of United

Parcel Service's (UPS) overnight delivery service. However, such an error by a third party does not demonstrate there was a lack of meeting of the minds as between the parties to the settlement agreement. There is no conduct attributable to State Farm which would demonstrate anything other than its assent to all conditions imposed. Such is sufficient to show "a binding contract was created, so far as the question of mutuality was concerned" and the Order of the trial court should be affirmed. Hansen v. Doan, 320 Ga. App. 609, 614 (2013).

If De Paz's argument is accepted, then the acts of a stranger to the settlement negotiations over whom State Farm had no control would dictate whether State Farm had a meeting of the minds with De Paz. Such is not the law, nor should it be. Indeed, in the cases relied on by De Paz, it was a purported error on the part of the insurer which led the courts to the ultimate conclusion that no settlement agreement had been formed. See, e.g., Grange Mut. Cas. Co. v. Woodard, 861 F.3d 1224, 1227-1228 (2017) (street address missing from the settlement checks due to error in insurer's computer system resulting in check not being timely delivered); Stephens v. Castano-Castano, 346 Ga. App. 284, 285 (2018) (insurer did not issue settlement checks until two weeks after expiration of demand); Benton v. Gailey, 334 Ga. App. 548, 551 (2015) (settlement checks were never sent because the insurer was waiting for probate court approval). In those cases, the conduct of the insurer could arguably

demonstrate lack of assent to the material terms of the settlement agreement. But there is no such conduct here.

Unlike the cases relied upon by De Paz, the only reason this case is now before this Court is because a third-party mail service failed to do what it promised to do. However, the acts of this third party should have no bearing on State Farm's acceptance of all material conditions of the settlement agreement. Where an insurer, such as State Farm, completes every single act within its control to comply with the conditions imposed in a settlement demand, up to and including putting the check in the mail via overnight delivery to the correct address with proper postage, both the law and the public policy should allow the insurer and the insured to enforce the settlement agreement.

The practical reality of De Paz's position is unworkable and contrary to public policy in favor of settlement. An insurer will almost always have to rely on a third party to deliver settlement funds to a claimant, by the United States Postal Service, private mail carrier, attorneys or couriers, and there are a myriad of events outside of the control of the insurer which could limit the third party's ability to deliver the settlement funds in the period of time imposed by the claimant. While an offer to settle which "calls for an act, [] can be accepted only by the doing of the act" under this factual scenario, the "doing of the act" which was within State Farm's control was completed when it delivered a properly addressed settlement check with proper

postage to a third party, requesting delivery well before the deadline set by Appellant. Herring v. Dunn, 213 Ga. App. 695, 699 (1994). If the insurer cannot rely on a third party to carry out its intent by timely delivering the settlement funds, there would be no certainty for any insurer responding to a time limited demand. Such an outcome would create unnecessary risk for both insurers and insureds and could cause grave harm for which there would be no recourse.

More broadly, it should not be so difficult for an insurance company to pay its policy limits and resolve claims on behalf of an insured. Had settlement been the true goal of De Paz's settlement demand, settlement could have easily been achieved, as State Farm reissued the check immediately upon being notified the original check had been lost in the mail. Instead, in this case as in so many others, the true intent was something other than settlement. As has been recognized, "to a plaintiff whose injuries greatly exceed the available coverage, a policy-limits settlement can be less valuable than a rejected offer and consequent bad-faith claim — however dubious the claim." Wright v. Nelson, 358 Ga. App. 871 (2021) (McFadden, J., concurring). And so, almost thirty years after the Supreme Court issued its opinion in Southern General Insurance Company v. Holt, and cautioned that it was not creating a rule of law that would allow plaintiff's attorneys to "set up" insurance companies, 262 Ga. 267, 269 (1992), and despite efforts to enact a legislative reform, the "bad faith setup" persists in Georgia, now more than ever. See

also A Critical Review of the Practice of Setting Up Insurance Companies for Bad Faith, 31 No. 9 Cal. Tort Rep. 1 (2010) (noting "[t]he time-limited settlement demand in a third party liability case is the prototypical bad faith setup fact pattern….even if the insurer meets the deadline, the claimant may attempt to back out of the settlement agreement under a pretext he blames on the insurer. The key for the claimant is to avoid settlement at all costs, without making it look like he is trying to avoid settlement."); Kingsley v. State Farm Mut. Auto. Ins. Co., 353 F. Supp. 2d 1242, 1253 (N.D. Ga. 2005) (rejecting a position advocated by the plaintiff which "would create an even greater risk of 'set up'"). While a true solution may need to come from the Legislature, this case presents the Court with the opportunity to reject form over substance and discourage "gotcha" tactics.

No one seriously disputes that State Farm intended to accept the settlement offer and pay its policy limits on behalf of its insured. Where an insurer such as State Farm has acknowledged and undertaken all acts in its control necessary to satisfy the conditions imposed, and thereby manifested a meeting of the minds as to all conditions, the settlement agreement should be enforced. The failure of a third-party mail service to timely deliver the settlement check, through no fault of the insurer, does not change this outcome and the trial court's Order should be affirmed.

## CONCLUSION

For the foregoing reasons, GDLA, as *amicus curiae*, respectfully submits that this Court should affirm the decision of trial court finding an enforceable settlement agreement between the parties.

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

Respectfully submitted this 19th day of August, 2021.

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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 using the Court's electronic filing system which will automatically send e-mail notification to all attorneys of record and 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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