

IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S18C0517

FIRST ACCEPTANCE INSURANCE COMPANY OF GEORGIA, INC.,

Petitioner,

v.

ROBERT W. HUGHES, JR., as Administrator
of the Estate of Ronald Nathaniel Jackson

Respondent.

AMICUS CURIAE BRIEF OF THE
GEORGIA DEFENSE LAWYERS ASSOCIATION

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I. STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (“GDLA”) is an association of approximately 900 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.

The GDLA submits this amicus brief out of concern that the opinion below converts legal issues, which Georgia law treats as questions of law, into questions of fact. In reversing summary judgment for Petitioner First Acceptance Insurance Company of Georgia, Inc. on a “bad faith” failure-to-settle claim, the Court of Appeals concluded that a genuine issue of material fact exists regarding whether letters sent to Petitioner offered to settle personal injury claims and whether the

offer included a 30-day deadline for a response. See Hughes v. First Acceptance Ins. Co. of Ga., Inc., 343 Ga. App. 693, 697 (2017). The Court of Appeals' decision is contrary to well-established Georgia precedent that (1) interpretation of a settlement offer – like any contract – is a question of law, and (2) the question of whether a legal duty exists is a question of law. The GDLA respectfully submits that treating the interpretation of a settlement offer and the existence of a legal duty as questions of fact conflicts with long standing precedent from this Court as well as prior decisions by the Court of Appeals. Further, treating these issues as questions of fact, which require jury trials, will increase court congestion, delay litigation, and increase the expense of the resolution of disputes. Because the GDLA's members regularly represent defendants and insurance companies in civil litigation (the majority of which involve issues of interpretation of contracts or the existence of legal duties), the GDLA has a vested interest in having this Court correct the significant legal errors in the Court of Appeals' decision.

II. STATEMENT OF PERTINENT FACTS

This case involves allegations that Petitioner, a liability insurer, negligently and/or in bad faith failed to settle tort claims against its insured arising out of a multi-vehicle accident. The accident resulted in the insured's death and injuries to five other individuals. The insured had the statutory minimal liability insurance

coverage (\$25,000 per person, \$50,000 per accident) under a policy issued by Petitioner.

Due to the minimal limits and the multiple claimants, an attorney for Petitioner sent a letter to attorneys for all of the injured parties on January 15, 2009, seeking to schedule a global settlement conference with all parties. (R-1021.) After receiving no response, the attorney sent another letter to attorneys for all of the injured parties on February 2, 2009, again requesting participation in a global settlement conference. (R-1023 – 25.) Again, no one responded.

On June 2, 2009, an attorney for two of the injured parties responded to the letters from Petitioner’s counsel by sending a six page fax. (R-1295 – 1301.) The fax cover page referred to the “attached letter of today’s date with enclosures.” (R-1296.) Immediately after the fax cover page was a two-page letter dated June 2, 2009, which opened by acknowledging receipt of the letter from Petitioner’s counsel dated January 15, 2009 and Petitioner’s “interest in arranging a settlement conference/mediation in this matter.” (R-1297.) The letter then stated that the attorney’s clients “are interested in having their claims resolved within [Petitioner’s] insured’s policy limits, and in attending a settlement conference if [Petitioner’s counsel] th[ought] it would be helpful.” (Id.) The letter indicated that a “letter or representation and insurance information request for your use” was attached. (Id.) The letter continued,

If you are still thinking a settlement conference would be helpful to settling these claims, we are happy to attend. If you will please send me some dates that would work for everyone to meet, I will check my calendar and with my clients for dates when we are available.

(Id.) The attorney suggested a potential location, and even offered to take care of reserving space, for the global settlement conference based on where most of the involved parties were located. (Id.)

After mentioning his clients' uninsured motorist ("UM") insurance limits, the attorney explained,

Of course, the exact amount of UM benefits available to my clients depends upon the amount paid to them from the available liability coverage. Once that is determined, a release of your insured from all personal liability except to the extent other insurance coverage is available will be necessary in order to preserve my clients' rights to recover under the UM coverage and any other insurance policies. *In fact, if you would rather settle within your insured's policy limits now, you can do that by providing that release document with all the insurance information as requested in the attached, along with your insured's available bodily injury liability insurance proceeds.*

(Id. at 1297 – 98) (emphasis added).

Right after the two-page letter was a copy of the declarations page from the attorney's clients' UM insurance policy. (R-1299.) Following the declarations page was another two-page letter from the attorney, also dated June 2, 2009. (R-1300-01.) In the second letter, the attorney requested certain insurance information be provided "within thirty days of the date of this letter." (Id. at 1300.) The

request for insurance information mirrored the provisions of O.C.G.A. § 33-3-28, but did not reference the statute and did not comply with the statute, as the request (1) set a deadline of 30 days (as opposed to the 60 days provided in the statute), (2) did not “set forth under oath the specific nature of the claims asserted” (as required by the statute), and (3) was not sent “by certified mail or statutory overnight delivery” (as required by the statute). (See id.); O.C.G.A. § 33-3-28(a)(1).

Petitioner’s counsel received the June 2, 2009 fax and, after determining that there was no time-limited settlement demand, marked it for follow-up. (R-828, 1041 – 49.) On July 10, 2009, the attorney who sent the June 2 letters filed suit on behalf of his clients. (R-1302 – 06.) Three days later, on July 13, 2009, the attorney sent another fax to Petitioner’s counsel indicating that he would proceed with litigation because his clients were no longer willing to resolve the matter. (R-1307 – 08.)

III. SUMMARY OF ARGUMENT

The issue in this case concerns the two letters sent to Petitioner as part of the June 2, 2009 fax. More specifically, the Court of Appeals reversed the grant of summary judgment to Petitioner on Respondent’s claims for negligent or bad faith failure to settle based on its conclusion that the two letters, “at the very least, create genuine issues of material fact as to whether [one of the individuals] offered to settle her claims within the insured’s policy limits and to release the insured from

further liability, and whether the offer included a 30-day deadline for a response.”
Hughes, 343 Ga. App. at 697.

However, as explained below, the issue in this case presents a question of law, not a question of fact. Under Georgia law, a claim against a liability insurer for failure to settle arises in tort. This Court has made clear that whether a duty of care exists, and to what extent, upon which tort liability can be based is a question of law. Further, liability for failure to settle inherently involves a settlement offer (like any contract), and this Court has also made clear that interpretation of a settlement offer is a question of law. Because the Court of Appeals’ decision erroneously converts obvious questions of law into questions of fact, this Court should grant certiorari. Without review by this Court, the Court of Appeals’ decision may lead to confusion in the courts below and will likely result in significantly more jury trials to decide legal issues which should be decided by judges, which, in turn, will increase court congestion, delay litigation, and increase the expense of litigation. All of which demonstrate the great concern, gravity, and importance to the public of this case. As such, certiorari should be granted.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Standard for Granting Petitions for Certiorari

This Court grants petitions for certiorari and reviews cases “of great concern, gravity, or importance to the public” and cases of “confusion and

unfairness.” Ga. S. Ct. R. 40; Sharpe v. DOT, 267 Ga. 267, 270 (1996).

Circumstances that satisfy the standard include: (1) cases where the decision of the Court of Appeals is in real conflict with the case law from the Supreme Court; and (2) cases where the decision of the Court of Appeals is in real conflict with other Court of Appeals decisions. Christopher J. McFadden, et al., Georgia Appellate Practice § 21:3 (2015-16 ed.).

This case presents both circumstances that satisfy the standard. The Court of Appeals’ decision – that a question of fact exists regarding whether the letters sent to Petitioner offered to settle claims and whether the offer included a 30-day deadline for a response – stands in stark contrast to numerous decisions from this Court and the Court of Appeals that hold that the existence of a legal tort duty and the interpretation of a contract (including settlement offers) are questions of law. The Court of Appeals’ decision, thus, results in “confusion and unfairness” to litigants involved in civil actions involving tort claims or contract offers, because it is now unclear whether and when the existence of a legal duty or the interpretation of a contract will be decided by a judge or by a jury. It is inherently unfair for litigants to have pure issues of law decided by juries, who lack the necessary legal training. Moreover, by converting these questions of law into questions of fact, the Court of Appeals’ decision will result in significantly more jury trials, which, in turn, will increase court congestion, delay resolution of disputes, and increase the

expense of litigation. Certainly, these consequences are of great concern, gravity, and importance to the public. Accordingly, the GDLA respectfully submits that this Court should grant certiorari to correct the Court of Appeals' legal errors and prevent consequences detrimental to the proper administration of justice.

B. Liability for Failure to Settle

Under Georgia law, a liability insurance company may be liable for an excess judgment entered against its insured based on the insurance company's failure to settle within policy limits. It is well-established that a claim for failure to settle is a tort cause of action. E.g., Hughes, 343 Ga. App. at 696; Canal Indem. Co. v. Greene, 265 Ga. App. 67, 73 (2003); S. Gen. Ins. Co. v. Ross, 227 Ga. App. 191, 196 (1997). As the Court of Appeals explained in its decision,

[W]hether the basis for imposing tort liability on the insurer is phrased in terms of bad faith or negligence, an insurer may be liable for damages for failing to settle for the policy limits if, but only if, such ordinarily prudent insurer would consider *choosing to try the case rather than accept an offer to settle within the policy limits* would be taking an unreasonable risk that the insured would be subjected to a judgment in excess of the policy limits.

Hughes, 343 Ga. App. at 696 (emphasis added) (quoting Baker v. Huff, 323 Ga. App. 357, 363-64 (2013)). This Court has likewise explained, “[w]hether an insurance company acts in bad faith in refusing to settle depends on ‘whether the insurance company acted reasonably *in responding to a settlement offer,*’ bearing

in mind that, in deciding whether to settle, the insurer must give the insured's interests the same consideration that it gives its own." Fortner v. Grange Mut. Ins. Co., 286 Ga. 189, 190 (2009) (emphasis added) (quoting Cotton States Mut. Ins. Co. v. Brightman, 276 Ga. 683, 685-86 (2003)).

In Brightman, this Court noted that, "[i]n determining whether the insured has breached its duty to its insured to settle, a factual issue is sometimes presented concerning whether the insurer had an opportunity to make an effective compromise." 276 Ga. at 685. See also id. at n.6 (citing, among other things, "Stephen S. Ashley, Bad Faith Actions: Liability and Damages §§ 3:25-3:29 (2d ed. 1997) (discussing prerequisites of a settlement offer)"). In Southern General Insurance Co. v. Holt, 262 Ga. 267 (1992), this Court "held that the insurer had a duty to its insured to respond to the plaintiff's deadline to settle the personal injury claim within policy limits when the insurer had knowledge of clear liability and special damages exceeding the policy limits." Brightman, 276 Ga. at 685. This Court explained that its holding in Holt "was consistent with the general rule that the issue of an insurer's bad faith depends on *whether the insurance company acted reasonable in responding to a settlement offer.*" Id. at 685 (emphasis added).

Recognizing that a failure to settle claim sounds in tort, the Eleventh Circuit Court of Appeals has noted that such a claim may be brought "when the insurer had a duty to settle the case, breached that duty, and its breach proximately caused

damage to the insured.” Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1546-47 (11th Cir. 1991). However, federal courts have recognized that Georgia law is unclear regarding “whether the insurer’s duty to settle arises only when the injured party offers to settle within limits.” Id. at 1547. See also Kingsley v. State Farm Mut. Auto. Ins. Co., 353 F. Supp. 2d 1242, 1249 (N.D. Ga. 2005) (determining that “Georgia law still is unclear with respect to whether an offer of settlement within the policy limits is required to establish liability for tortious refusal to settle”).

In Kingsley, the District Court evaluated the issue of whether a settlement demand within policy limits was required for a failure to settle claim. The court surveyed Georgia case law on the issue, and ultimately concluded that there must be a triggering event – something that puts the insurer on notice that it must respond or risk liability for an excess judgment. Kingsley, 353 F. Supp. 2d at 1252. In Kingsley, the injured party argued that the insurer’s “failure to tender the Policy limits prior to her secret deadline foreclose[d] the possibility of settlement and subject[ed] State Farm to liability” for failing to settle. Id. at 1251. The District Court rejected this argument and described it as “unprecedented under Georgia law, [] not consistent with the policies considered by the Georgia courts that have addressed these issues and otherwise [lacking] practical sense.” Id. According to the Kingsley court, fundamental to a failure to settle claim is

evidence that the insurer “at the very least knew the opportunity to settle within the policy limits would close because of the passage of a settlement deadline communicated by the plaintiff or the entry of a final judgment in the underlying action.” Id.¹

The court in Kingsley ultimately granted summary judgment to the insurer on the failure to settle claim, concluding that there was no triggering event because the plaintiff never communicated her secret deadline to the insurer. 353 F. Supp. 2d at 1252-53, *aff'd*, 153 F. App'x 555 (11th Cir. 2005) (per curiam). The court explained that accepting the injured party's argument (regarding her secret deadline) would lead to “unreasonable” results because “a plaintiff always could set a secret deadline for the tendering of the policy limits” and Georgia courts would not encourage that result. Id. at 1253. Indeed, the court noted that, in Holt, this Court expressly rejected a rule that would allow a plaintiff's attorney to set up an insurer for an excess judgment by imposing an unreasonably short deadline, and the plaintiff's position “would create an even greater risk of ‘set up.’ *If Georgia courts will not allow the imposition of an unreasonably short deadline within which to respond to a settlement offer, they certainly would not allow the*

¹ The court discussed this Court's decision in Brightman, *supra*, and noted that a critical fact in Brightman was that the insurer “knew not only the terms of the demand, *but also the exact date beyond which its insured was at risk for an adverse judgment exceeding the policy limits if [the insurer] did not accept the plaintiff's offer.*” Kingsley, 353 F. Supp. 2d at 1250 (emphasis added).

imposition of a secret and arbitrary one.” Id. at 1253-54 (emphasis added). In other words, consistent with prior decisions by this Court and the Georgia Court of Appeals, an insurance company cannot be held liable for failing to settle a claim within policy limits unless there is actually an offer to settle within policy limits. And that presents the question of whether there was actually an offer to settle. Thus, the question of whether there is a duty to settle presents a question of law for a court to decide, not a question of fact for a jury.

C. The Court of Appeals Erroneously Treated the Existence of a Legal Duty as a Question of Fact

A failure to settle claim sounds in tort. Like any tort claim, a failure to settle claim requires a legal duty owed to the plaintiff. E.g., Anderson v. Atlanta Comm. For the Olympic Games, Inc., 273 Ga. 113, 118 (2000); City of Douglasville v. Queen, 270 Ga. 770, 771 (1999). And, as this Court has made clear, “[t]he threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes the plaintiff a duty of care[,] . . . [and] [w]hether a duty exists upon which liability can be based is a question of law.” City of Rome v. Jordan, 263 Ga. 26, 27 (1993).

Moreover, as demonstrated by the preceding discussion of failure to settle claims, Georgia law is unclear regarding what triggers an insurer’s duty to settle. While the federal courts have made predictions about this issue, neither this Court nor the Court of Appeals has ever addressed the issue. As the federal courts have

suggested, the question of whether and to what extent an insurer owes a legal duty to settle requires an insurer “at the very least knew the opportunity to settle within the policy limits would close because of the passage of a settlement deadline communicated by the plaintiff or the entry of a final judgment in the underlying action.” Kingsley, 353 F. Supp. 2d at 1251. In short, the insurer cannot be held liable for failing to accept a settlement offer when no such offer was ever communicated to the insurer.

Here, the question of whether Petitioner knew of a demand – i.e., whether the letters communicated a settlement offer – turns on the interpretation of the June 2, 2009 letters. The interpretation of the settlement offers, like any contract, presents a question of law. Yet, according to the Court of Appeals’ decision,

It is apparent from a review of those letters that they, at the very least, create genuine issues of material fact as to whether Hong offered to settle her claims within the insured’s policy limits and to release the insured from further liability, and whether the offer included a 30-day deadline for a response.

Hughes, 343 Ga. App. at 697. Thus, the Court of Appeals erroneously held that a jury should decide what is fundamentally a question of law: whether a contractual offer to settle existed that would trigger a duty to respond. The issue of whether Petitioner had a duty to settle turns on two questions of law: (1) whether the June 2 letters constituted an offer to settle within the policy limits, and (2) whether the letters included a 30-day deadline for a response. Because these are questions of

law, the Court of Appeals' decision – that a jury should decide – constitutes a significant legal error, which satisfies the standard for certiorari. Accordingly, the GDLA respectfully submits that this Court should grant certiorari.

D. The Court of Appeals Erroneously Treated Interpretation of a Settlement Offer as a Question of Fact

While a failure to settle claim sounds in tort, it is clear that such claims inherently involve interpretation of settlement offers. That is especially true in this case where there is the threshold issue of whether a settlement demand was ever made. Under Georgia law, interpretation of a settlement offer presents a question of law. E.g., H&E Innovation, LLC v. Shinhan Bank Am., Inc., No. A1712138, 2017 Ga. App. LEXIS 567 (Ga. Ct. App. Nov. 14, 2017); Lamb v. Fulton-DeKalb Hosp. Auth., 297 Ga. App. 529, 533 (2009). As this Court has explained, the construction of a contract involves three steps:

At least initially, construction is a matter of law for the court. First, the trial court must decide whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its clear terms; the contract alone is looked to for its meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.

Borders v. City of Atlanta, 298 Ga. 188, 196 (2015). See also Atlanta Dev. Auth. v. Clark Atlanta Univ., Inc., 298 Ga. 575, 579 (2016) (initial construction of

contract is question of law for the court) (citing City of Baldwin v. Woodard & Curran, Inc., 293 Ga. 19, 30 (2013)). Here, the Court of Appeals did not follow any of the steps to interpret the June 2, 2009 letters. Instead, the court simply concluded,

It is apparent from a review of those letters that they, at the very least, create genuine issues of material fact as to whether Hong offered to settle her claims within the insured's policy limits and to release the insured from further liability, and whether the offer included a 30-day deadline for a response.

Hughes, 343 Ga. App. at 697. Notably, the Court of Appeals did not even attempt to interpret the June 2, 2009 letters. It did not determine whether the language in the letters was ambiguous. And, it did not utilize any of the applicable rules of construction. Because the Court of Appeals did not follow either of the first two steps for interpretation of a settlement offer, its conclusion that a jury must resolve whether the letters offered to settle claims and whether the letters included a 30-day deadline for a response constitutes a significant legal error and conflicts with well-established precedent in Georgia.

This Court granted certiorari in a previous case where the Court of Appeals disregarded settled principles of Georgia law and held that a jury, not a court, should construe a contract. Travelers Ins. Co. v. Blakey, 255 Ga. 699 (1986). In Travelers, there was a dispute about certain language in a medical insurance contract, and the trial court submitted construction of the disputed language to the

jury. After the Court of Appeals affirmed (holding that the language was ambiguous and accordingly was within the province of the jury to construe), this Court granted certiorari to determine “whether or not the construction of a written contract is the responsibility of the court, or within the province of a jury.” Id. at 699.

In its opinion, this Court concluded that the Court of Appeals erroneously employed a two-step procedure when construing the contract at issue (first, court determines if ambiguous, and, second, if ambiguous, jury resolves), rather than the three-step procedure prescribed by Georgia law. Travelers, 255 Ga. at 699-700.

As this Court explained,

the construction of a contract is a question of law for the court. Where any matter of fact is involved (as the proper reading of an obscurely written word), the jury should find the fact.’ Contracts, even when ambiguous, are to be construed by the court and no jury question is presented unless after application of applicable rules of construction an ambiguity remains.

Id. at 700 (emphasis in original) (quoting Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 880-81 (1981)).

Except in cases where the meaning of obscurely written words is involved, and where there is evidence tending to show that the meaning of such words was differently understood in one way or another by the parties to the contract, it is improper for the court to give the jury any instruction with regard to the manner in which the contract should be construed.

Id.

The Travelers Court vacated the Court of Appeals’ decision and remanded, because the Court of Appeals did not acknowledge “the principle that even ambiguous contracts are to be construed by the court unless an ambiguity remains after application of the applicable rules of construction.” 255 Ga. at 700.

Likewise, in the present case, a court, applying principles of contract construction, should determine if Petitioner was presented with an offer to settle within policy limits and if that offer had a deadline – which is the approach employed by the State Court of DeKalb County in granting summary judgment. Because the Court of Appeals’ decision conflicts with well-settled principles of Georgia law, it constitutes a significant legal error and will lead to confusion in the law if not corrected by this Court. Accordingly, the GDLA respectfully submits that this Court should grant certiorari.

V. CONCLUSION

For the foregoing reasons, the GDLA, as *amicus curiae*, respectfully submits that this Court should grant certiorari.

Respectfully submitted this 1st day of February, 2018.

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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 as follows:

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