IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NO. A23A0394

AARON PIERCE

Appellant,

v.

KYNDYL YVETTE BANKS and OCTAVIUS AVERY SMITH

Appellees.

BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE

James D. Meadows, President
Philip Thompson, Co-Chair
Elissa B. Haynes, Co-Chair
Patrick Silloway, Vice Chair
Georgia Defense Lawyers Association
P.O. Box 67
Rossville, Georgia 30741
Phone: (706) 956-4848
PO Box 67
Rossville, GA 30741

Prepared by:

N. Staten Bitting, Jr.
Georgia Bar No. 058940
Mary Elizabeth Watkins
Georgia Bar No. 370307
Levy, Sibley, Foreman & Speir, LLC
3730 Executive Center Dr., Suite B
Augusta, GA 30907
Phone: (706) 739-5054
sbitting@lsfslaw.com
lwatkins@lsfslaw.com

STATEMENT OF THE ISSUES

Despite Appellant's statement that this appeal concerns a single issue, two issues have been raised. The first is whether, on the facts in this record, Appellees sufficiently accepted and met the material terms of Appellant's offer to settle so that a binding settlement agreement was formed. The second issue is whether the State Court exceeded its authority in entering an order and judgment enforcing the settlement.

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. 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 appeal are of great importance to GDLA's members.

The July 8, 2022 Order of the State Court of Athens-Clarke County granting Appellee's Motion to Enforce Settlement is well reasoned, factually and legally correct, and should be affirmed. (V2-6–17.) Additionally, the July 11, 2022 Final Judgment entered by the State Court of Athens-Clarke County is effective, is within the court's authority to enforce the terms of the settlement entered into by the parties to this case, and should be affirmed. (V2-4–5.)

STANDARD OF REVIEW

The standard of review for a ruling on a motion for summary judgment and a motion to enforce settlement is de novo. Allen v. Sea Gardens Seafood, 290 Ga. 715, 717, 723 S.E.2d 669, 671 (2012).

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT CORRECTLY FOUND THE PARTIES FORMED A BINDING SETTLEMENT AGREEEMENT

Appellant presented a time-limited offer to settle for the liability insurer's policy limits, pursuant to the pre-suit provisions of O.C.G.A. § 9-11-67.1.[1] The time-limited, policy limits settlement offer at issue is actually Appellant's second

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

offer to Appellees, but the validity of the first offer is not in dispute for the purposes of this appeal. The offer at issue in this appeal was dated August 30, 2021. (V2-89–90.) It was addressed to Appellees' auto insurer, Trexis One Insurance Corporation ("Trexis"), through counsel for Appellees, Banks and Smith. The offer did include additional terms beyond those articulated in the statute. *Id.* Counsel for Appellees timely responded to this offer with a letter stating that the insurer had authorized her to accept the terms of the offer "in its entirety." (V2-157.) The written response enclosed a settlement check payable to Appellant and Appellant counsel's law firm, as well as a proposed limited liability release. (V2-137–138.) No issue has been raised concerning the contents of the proposed release. Counsel for Appellant returned the settlement check and advised that Appellant did not consider the response to the offer to be an acceptance. (V2-105–107.)

Appellant provides four ostensible reasons for arguing that Appellees did not comply with all terms of the offer and, therefore, no binding settlement agreement occurred. Appellant asserts: 1) payment submitted with the acceptance letter did not comply because the demand provided that "payment must be received 15 days after Trexis' written acceptance" of the offer; 2) payment was subject to an expiration, contrary to the express terms of Appellant's demand, because the settlement check stated on its face that it was "VOID AFTER 180 DAYS"; 3)

Appellees did not accept the offer in writing because counsel wrote that she had been "authorized . . . to accept" the demand but did not write that Trexis accepted the offer; and 4) Appellees changed a term of the settlement when the check was issued to "Aaron Pierce and Brooks Injury Law LLC" because Appellees omitted the comma between "Law" and "LLC". (Brief of Appellant, 7–11.)

When determining whether the parties entered a settlement agreement, Georgia Courts rely on traditional principles of contract law, "[b]ut the law also favors compromise, and when parties have entered into a definite, certain, and unambiguous agreement to settle, it should be enforced." *Greenwald v. Kersh*, 275 Ga. App. 724, 726, 621 S.E.2d 465, 467 (2005). The trial court addressed each of Appellant's contentions and decided each issue in favor of finding a binding settlement. This brief will address each of Appellant's alleged variances, as well.

A. Payment Provided Early was Received Timely

Appellant demanded payment "must be received 15 days after Trexis' written acceptance of this offer of compromise." The undisputed facts show that the settlement check was delivered to Appellant's attorney *before* the 15th day following acceptance. Appellant argues that payment received *with* the written acceptance was not received on the 15th day *after* written acceptance, and therefore, the acceptance is invalid. However, Appellee's offer was silent on the

delivery of payment. Appellant's payment clearly complied with the offer requiring receipt 15 days after written acceptance.

Appellant argues 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. Appellant's reliance on *de Paz* is misplaced. In *de Paz*, this 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 date 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 outcome in *de Paz* does not suggest that the receipt of payment before the date specified in the offer amounts to rejection.

Even if the Court's holding in *de Paz* supports Appellant's argument that, as the offeror, he can require payment to be delivered on a date certain, Appellant did not make that a material term of the offer. As the architect of the demand,

Appellant cannot now rely on a purported ambiguity in the language to try to create a new term in his offer. Appellant'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)).

Appellant apparently rejects the plain meaning of "received" in asserting payment was not received 15 days after acceptance, but Appellant 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 variance from the terms of the offer. Appellant's argument presupposes that "received on the 15th day" has the same meaning as "delivered on the 15th day". As the trial court's order states, Appellant's offer explicitly required Appellant's counsel to receive payment by a certain date, not for the insurer to deliver payment on a certain date. Counsel for Appellant was "in receipt" of the settlement check upon delivery of the letter, check, and release. Once payment is delivered, it remains "received" until and unless returned.

While Appellant states that no reasoning is required for the terms of an offer, he purports to offer one. He argues that health insurance reimbursement claims are governed in part by Georgia's reimbursement statute, which requires that the

injured party's health insurer shall be provided notice of a settlement "not later than ten days prior to *consummation* of any settlement." O.C.G.A. § 33-24-56.1(g) (emphasis added). Appellant argues that payment is needed on the 15th day after acceptance so that he can provide timely notice to the health insurer.

Appellant offers no authority as to the effect of the delivery of the settlement check or when a settlement is consummated. Rather, Appellant conflates 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, but it is consummated by execution of the settlement agreement. *Cf. Hospital Authority of Clarke Co. v. Geico General Ins. Co.*, 294 Ga. 477, 479, 754 S.E.2d 358, 360 (2014) (holding that liability was "finally determined" when the settlement was executed with a general release, in interpreting the hospital lien statute, O.C.G.A.§ 44-14-473(a)). To ensure compliance with the reimbursement statute, the recipient of the settlement check can simply hold the check for the ten-day notice period. After providing notice under the statute, the settlement check can be deposited in the proper account and the settlement can be consummated.

Based on the obvious, reasonable interpretation of Appellant's offer, since Appellant was required to have received payment on the 15th day from the written

acceptance, payment made prior to that date was received timely. Appellees accepted by delivering payment within the specified time period, under the plain meaning of the term of the offer.

B. Payment by Bank Check Was Without Restrictions from Insurer

Appellant asserts the parties did not have an agreement because Trexis added a restriction or expiration when it provided payment by a check that indicated it was "VOID AFTER 180 DAYS." Appellant's argument fails to acknowledge that the language was included by the banking institution, rather than the insurer. Moreover, Appellant fails to reconcile his argument with the express language of O.C.G.A. § 9-11-67.1(f)(5), which permits payment by bank check.

Georgia law states that the payment made in response to a pre-suit settlement offer may be made by a bank check. O.C.G.A. § 9-11-67.1(f)(5). The Uniform Commercial Code, as adopted by Georgia, also provides that a bank is under "no obligation to pay a check … which is presented more than six months after its date." O.C.G.A. § 11-4-404. Appellant's proposed result would render most of the payment methods, which are specifically permitted in the statute, ineffective, as most payment methods are subject to the applicable state law.

Appellant does not dispute that Trexis chose an acceptable method of payment, but he incorrectly asserts that Trexis modified the payment to include an expiration. The language on the face of the check, placed there by a bank and not

Trexis, merely states the existing law pertaining to the bank check. As the trial court correctly pointed out, Trexis did not impose any condition, expiration, or restriction as part of its acceptance of the offer. Appellant fails to show that Trexis varied the terms of the offer by submitting this payment.

C. The Written Response to Appellant's Offer with Payment Constituted Written Acceptance by Appellees

Appellant also contends that he did not have an agreement with Appellees because neither the insurer nor the insureds complied with the requirement to accept his offer in writing. Appellant argues that the response stating counsel for Appellees was authorized by Trexis to accept the offer in its entirety is not acceptance. Appellant also argues that the insureds, themselves, did not accept the settlement in writing.

Appellant points to the language in O.C.G.A. § 9-11-67.1(b) to show Appellees were required to respond to the demand in writing. However, O.C.G.A. § 9-11-67.1 imposes no requirement for the parties to accept an offer in writing. The statute permits the offeror to create additional terms for a pre-suit agreement and permits the recipient to provide written acceptance. O.C.G.A. § 9-11-67.1(b). The offer at issue in this case specifically stated "Trexis must accept each of the aforementioned material terms in writing" to comply. (V2-89–90). Appellant's offer did not specifically require acceptance by Appellees, Banks and Smith, in writing. Counsel for Appellees subsequently responded, in writing, that "Trexis

One Insurance Corporation has authorized me to accept your demand dated August 30, 2021, and its terms in their entirety." (V2-96). The written response also included a settlement check for the agreed-upon amount. (V2-180–185.) Appellant offers no authority for his contention that Banks and Smith have failed to comply with the demand by responding through counsel.

Appellant also attempts to inject ambiguity in the acceptance by suddenly treating the insurer, Trexis, as though it has no authority to act on behalf of its insureds and by treating counsel for Appellees as though she had no authority to act on behalf of her client. Throughout negotiations, Appellant consistently communicated through his attorney to relay offers either directly to the insurer or to Appellees through counsel. (V2-71–78, 86–87, 89–90.) By submitting offers directly to the insurer, counsel for Appellant recognized that the insurer has authority to negotiate on behalf of its insured, pursuant to their automobile liability policy. *See* O.C.G.A. § 33-7-12(a) (creating an independent contractor relationship between insurer and insured from the liability policy provision permitting insurer to compromise claims against insured). Appellant's reliance on a request, made directly to Trexis, for payment for the damages allegedly caused by its insureds, is wholly inconsistent with its current assertion that the insureds must communicate acceptance separately from the insurer.

Furthermore, Appellees' response stating that counsel was authorized to accept the offer in its entirety reasonably constituted an acceptance of the offer. As the trial court acknowledged, to the extent there was any ambiguity in the language accepting the offer, the inclusion of payment would confirm the intent of Appellees in the written response. Appellant's argument that Appellees did not comply with the offer because of counsel's written response relaying acceptance, which included payment, is without merit.

D. The Omitted Comma in the Paycheck Was Immaterial to the Settlement Agreement

Lastly, Appellant disingenuously argues that the omission of the comma between Law and LLC on the settlement check amounts to a rejection of the offer, while acknowledging that the discrepancy in the text would not impact the ability of the payee to accept the payment. Appellant ignores the materiality of the discrepancy and asks this Court to issue an opinion that *any* immaterial variance between the offer and the acceptance should constitute a rejection of the offer. Georgia law does not require this result. *See de Paz*, 361 Ga. App. at 298–99, 864 S.E.2d at 139 ("[T]he judiciary has the duty to reject the construction of a statute which will result in unreasonable consequences or absurd results not contemplated by the legislature.") (quoting *Haugen v. Henry County*, 277 Ga. 743 (2004)).

Appellant does not dispute the fact that the omission of the comma in the payee's name would not affect the negotiability of the check. Nevertheless,

Appellant insists that the absence of the comma in the payee's name is fatal to the parties' agreement because the absence of commas in other, unrelated contexts has led to misunderstandings and legal consequences.

To support his position, Appellant cites to a case arising from interpretation of a Maine statute involving a series of activities expected of delivery drivers, where an omitted comma had the effect of excluding a distinct activity from the list of activities and potentially exempting the drivers from protection of the state's overtime law. *O'Conner v. Oakhurst Dairy*, 851 F.3d 69, 70 (1st Cir. 2017). The case Appellant relies on is inapposite. The ambiguity at issue in *O'Connor* existed because the meaning of the text in the statute in that case hinged on the presence or absence of a comma. *Id.* This case involves the omission of a comma in the unmistakable identification of the payee on a settlement check. Appellant does not offer any evidence, or even reasoning, to attempt to explain why the omission of the comma on the settlement check would be material to the terms of their agreement.

Appellant's demand required that "payment must be made to Aaron Pierce and Brooks Injury Law, LLC." The check was made payable to "Aaron Pierce and Brooks Injury Law LLC." The substance of the demand was that the settlement check was to be made payable to Appellant and his counsel's law firm. Payment was made to Appellant and his counsel's law firm. The omitted comma in the

payee's description on the settlement check is not a material variance and does not constitute a rejection of Appellant's offer.

II. THE TRIAL COURT DID NOT EXCEED ITS AUTHORITY OR ORDER SPECIFIC PERFORMANCE.

Appellant asserts that the enforcement of the settlement agreement by the State Court exceeded its legal authority because it did not have jurisdiction to award specific performance. This argument misconstrues the trial court's Order and Final Judgment. The trial court determined that the parties reached an enforceable settlement agreement. Once a settlement has been found to occur, trial courts have a "duty" to enforce these contracts "as made." *Herring v. Dunning*, 213 Ga. App. 695, 697, 446 S.E.2d 199, 201 (1994).

The relief provided by the court was not equitable. The court simply found that an enforceable contract for settlement was formed and that Appellant was in breach. The effect of the judgment is no different than finding Appellant is entitled to recover $25,000.00 under the agreement made on the terms of their settlement offer made pursuant to O.C.G.A. § 9-11-67.1. Appellant's argument that the trial court exceeded its authority also fails.

CONCLUSION

There is no doubt Appellant's true motivation in trying to avoid reasonableness for the sake of exactness is to pursue a claim of bad faith refusal to settle within the policy limits and to seek extra-contractual recovery from the auto

insurer. To accept the arguments offered by Appellant would invite quibbling over reasonable, agreed upon terms and have the effect of encouraging more detailed requirements as material terms of settlement offers in an effort to make noncompliance more likely. The request of this *amicus* brief is that the Court recognize Appellees' compliance with all of the material terms of the settlement offer and disregard Appellant's unsubstantiated assertion that any immaterial variance must amount to a rejection of an offer.

For the foregoing reasons, the Order granting enforcement of the settlement and the Final Judgment of the trial court should be affirmed.

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

This 12th day of June, 2023.

Georgia Defense Lawyers Association
James D. Meadows, President
Philip Thompson, Co-Chair
Elissa B. Haynes, Co-Chair
Patrick Silloway, Vice Chair
P.O. Box 67
Rossville, Georgia 30741
Phone: (706) 956-4848

Levy, Sibley, Foreman & Speir, LLC
/s/ N. Staten Bitting, Jr.
N. STATEN BITTING, JR.
Georgia Bar No. 058940
MARY ELIZABETH WATKINS
Georgia Bar No.: 370307
3730 Executive Center Dr., Ste B
Augusta, Georgia 30907
Phone: (706) 739-5052
sbitting@lsfslaw.com
lwatkins@lsfslaw.com

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 BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE by U.S. mail, with adequate postage for delivery, to the following:

Ben C. Brodhead
Ashley B. Fournet
Michael Arndt
BRODHEAD LAW, LLC
3350 Riverwood Parkway, Suite 2230
Atlanta, GA 30339
ben@brodheadlaw.com
ashley@brodheadlaw.com
michael@brodheadlaw.com
Attorneys for Appellant

Alexandra M. Svoboda
Rakhi McNeill
WALDON ADELMAN CASTILLA HIESTAND & PROUT
900 Circle 75 Parkway, Suite 1040
Atlanta, GA 30339
Attorneys for Appellee

This 12th day of June, 2023.

/s/ N. Staten Bitting. Jr.
N. STATEN BITTING, JR.