

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

Case No. A24A1028

WILLIAM COLE REDFEARN

Appellant,

vs.

**JAADE MOORE, INDIVIDUALLY AND AS THE ADMINISTRATOR OF
THE ESTATE OF THEODORE MOORE, JR., AND SEIRRA MOORE,**

Appellees.

**AMICUS CURIAE BRIEF OF
THE GEORGIA DEFENSE LAWYERS ASSOCIATION**

On Behalf of:
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IDENTITY AND INTEREST OF AMICUS CURIAE

The Georgia Defense Lawyers Association (“GDLA”) is an association of more than 800 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 most recent 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 of what terms may be in a pre-answer offer to settle under the current 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 William Cole Redfearn (“Appellant”), accepted the material terms of a settlement offer made by

appellees Jaade Moore, individually and as the administrator of the Estate of Theodore Moore, Jr., and Sierra Moore (collectively “Appellees”). In its order denying Appellant’s motion to enforce the settlement, the trial court failed to consider the controlling Georgia statute, O.C.G.A. § 9-11-67.1, and erroneously applied common law principles to find that no enforceable agreement existed.

As discussed in more detail below, O.C.G.A. § 9-11-67.1 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, a settlement is formed when the recipient of the offer, here State Farm, accepts the material terms outlined in the statute, notwithstanding Appellees’ attempts to insert additional terms in an effort to force a rejection.

Because the trial court did not apply this standard in deciding the motion below, the Court should find the trial court erred. Applying the correct standard, the Court should affirm the judgment of the trial court on different grounds, finding Appellees failed to make a valid offer under O.C.G.A. § 9-11-67.1 because its offer included statutorily prohibited additional terms. Alternatively, if the Court finds Appellees’ 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. The trial court erred in 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 applying common law principles instead of the requirements of O.C.G.A. § 9-11-67.1 in evaluating Appellant’s motion to enforce settlement. In its order, the trial court 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).¹ (V.2/R.7-17.) Because Woodard was decided before the current version of § 9-11-67.1 was enacted in 2021, this holding has been abrogated by statute. Notably, the trial court failed to even cite O.C.G.A. § 9-11-67.1 in its order.

In Woodard, the Supreme Court interpreted the prior version of § 9-11-67.1. 300 Ga. at 852-58. The court specifically found that the plain language of the statute as it existed at the time “d[id] not expressly or by necessary implication contravene . . . common law principles,” including the principle that “an offeror is the master of his or her offer, and free to set the terms thereof.” Id. at 853-54.

¹ The trial court also cited to Duval & Co. v. Malcom, 233 Ga. 784, 214 S.E.2d 356 (1975), which discusses common law contract principles generally and not specifically in the context of settlement agreements.

Because of this principle, the Woodard court held that, though § 9-11-67.1 mandated that the enumerated terms must be in every pre-suit offer of settlement, “additional terms are not prohibited.” Id. at 855. The 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. 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). This Court has already acknowledged that, under the 2021 version of § 9-11-67.1, the decision in Woodard that pre-suit offers may include additional terms no longer holds true. See 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)) (“We note that, under the current version, 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.”).

The current version of O.C.G.A § 9-11-67.1 applies to this action.²

Therefore, because the trial court applied the standard articulated by Woodard and not the correct standard found in O.C.G.A. § 9-11-67.1, the trial court clearly erred by applying the wrong legal standard to the motion below.

II. O.C.G.A. § 9-11-67.1 does not allow a party to add additional terms to a settlement offer beyond the “material terms” established by statute unless both parties agree.

² The subject accident occurred on September 10, 2021. (V.2/R.116.)

Under the version of O.C.G.A. § 9-11-67.1 that applies to this case, there are five “material terms” that must be included in any offer to settle a claim arising out of a motor vehicle collision. O.C.G.A. § 9-11-67.1(a)(1). Moreover, the statute expressly states that the terms set forth in subsection (a) are the only terms which can be included in an offer to settle under the statute. O.C.G.A. § 9-11-67.1(b)(1). The statute further provides that “[t]he 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(b)(2). That is precisely what occurred in this case.

The current 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 previous 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 previous 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). This Court should not allow Appellees to avoid what the General Assembly intended when it revised § 9-11-67.1 to eliminate the type of gamesmanship demonstrated in this case.³

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, . . . 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,

³ It cannot be seriously disputed that the goal of the settlement offer sent by Appellees was not to reach a binding settlement, but rather, to ensure that the demand would be rejected. If Appellees’ intent was to accept the policy limits to settle their claims against Appellant, they could have simply done so.

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 current 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, 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 negotiation. 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.

Second, 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.” 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 prior 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).

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.⁴

Finally, subsection (b)(2) allows “[t]he recipients of an offer to settle made under this Code section” to accept such an offer “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(b)(2). Therefore, under the plain and ordinary meaning of this language, the recipient of an offer governed by § 9-11-67.1 may accept such an offer simply by providing written acceptance to the material terms outlined in subsection (a).

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).⁵ The trial court erred in not applying this statutory standard to the motion below. Accordingly, this Court should reverse the trial court’s decision and apply the proper standard to the undisputed facts in this case.

III. The trial court erred in not applying O.C.G.A. § 9-11-67.1 and finding either that no settlement agreement exists because Appellees failed to

⁴ 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.

⁵ While this might seem impractical, there was no need for Appellees to insert additional terms in the demand if their only intent was to effectuate a settlement. Had Appellees wished to add additional terms, rather than attempt to force a rejection, they could have negotiated such terms with Appellant.

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 to the facts as presented below creates two possibilities: (1) Appellees 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. Appellees 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 Appellees failed to comply with O.C.G.A. § 9-11-67.1 and therefore presented State Farm with an invalid offer. As discussed above, see supra Part II, 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).

Section 9-11-67.1 governs “any offer to settle a tort claim for personal injury, bodily injury, or death arising from the use of a motor vehicle.” O.C.G.A. § 9-11-67.1(a) (emphasis added). Because Appellees’ offer was to settle “a tort claim for personal injury, bodily injury, or death arising from the use of a motor vehicle,” § 9-11-67.1 necessarily applies. To the extent Appellees argue 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 Appellees' offer in this action included terms beyond those outlined in § 9-11-67.1(a). It is also beyond dispute that Appellees did not obtain either Appellant's or State Farm's written agreement for the inclusion in the offer of additional terms beyond those outlined in subsection (a). Appellees' 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. 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 Appellees

failed to serve a valid offer under § 9-11-67.1—and not that State Farm rejected the purported offer—and therefore no settlement agreement exists.⁶

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 Appellees’ offer is valid to the extent it includes the material terms outlined by subsection (a), State Farm, on behalf of Appellant, accepted Appellees’ 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). Appellees’ offer provided the following terms: (1) acceptance must be within 31 days; (2) the settlement amount is \$50,000.00; (3) the party to be released is Appellant, William Redfearn; (4) Appellees would execute a limited release; and (5) the claims to be released are

⁶ 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 Appellees’ intent was to accept the 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.

the claims of Jaade Moore and Sierra Moore for the wrongful death of Theodore Moore, Jr. and the claims of the Estate of Theodore Moore, Jr. for the pain and suffering and the funeral, medical and other necessary expenses resulting from the injury and death of Theodore Moore, Jr. that were caused by a collision on September 10, 2021.

(V.2/R.146-47). 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. (V.2/R.147.)

State Farm sent Appellees' attorney a letter within the prescribed time period that was intended to "serve as written acceptance of the Demand dated April 13, 2022." (V.2/R.153.) 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 Appellees' offer and formed an enforceable settlement agreement as to those terms.⁷

Accordingly, if the Court finds Appellees' 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.

⁷ 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).

CONCLUSION

For the foregoing reasons, the GDLA, as *amicus curiae*, respectfully submits that the trial court's decision should be reversed because the court applied the incorrect standard. 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 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 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 4th day of April, 2024.

[Signatures on Following Page]

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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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This 4th day of April, 2024.

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*On Behalf of the Georgia Defense Lawyers
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