IN THE COURT OF APPEALS OF GEORGIA

JAMES ALVIN GRAHAM, individually and as Administrator of the Estate of Joel Graham, Appellant, **v.** **HHC ST. SIMONS, INC.** d/b/a St. Simons by the Sea, Appellee.	**Case no. A13A0454**

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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I. STATEMENT OF INTEREST

The Georgia Defense Lawyers Association is an association of more than 700 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. 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 promoting improvements in the administration of justice.

Ensuring predictability, fairness, and reasonableness in enforcement of settlement agreements is of key importance to all persons and companies involved in litigation of civil matters in Georgia courts. In addition, the GDLA was invited by the Court of Appeals to prepare and submit an *amicus curiae* brief on the issue in question. As settlements by their very nature involve one or more persons or entities asserting claims of liability against one or more other persons or entities, 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 supports the well-established principle of freedom of parties to contract, including in the context of settlement agreements. Where settlement

agreements are sufficiently definite and there is an offer and an acceptance that contemplate the same terms and operate on the same consideration, the GDLA believes those agreements should, of course, be enforced. But the GDLA does not believe that settlement offers should be enforced when it would not carry out the intended purposes of both parties to the contract.

The GDLA believes that permitting a plaintiff to "accept" a previously-made settlement offer after the court has entered summary judgment against the plaintiff would have a chilling effect on settlement in litigated matters. Defendants would be far less likely to make offers of settlement in cases where dispositive motions are pending, out of fear that they would not be quick enough in withdrawing the offer if a motion were ruled on while the offer remained open. Adopting the position advanced by Appellant with regard to his motion to enforce the purported settlement in the case below would have a chilling effect on settlement in civil cases in Georgia without providing any corresponding benefit whatsoever to anyone other than the Appellant in this case.

In addition, the GDLA believes that Appellees' prior offer in this case could not have been "accepted" by plaintiff after the trial court granted summary judgment to Appellees on the Appellant's claims, because the subject matter of the

purported agreement – i.e., the Appellant's claims – had been eliminated, or at least modified significantly, by the time of the purported acceptance. The GDLA believes that settlement agreements should be based on a good-faith effort of both parties to settle within the same rules that apply to other contracts, and not based on a unilateral "acceptance" by the offeree for less than the original consideration contemplated by the offeror.

II. ARGUMENT AND CITATION OF AUTHORITY

This case concerns a settlement offer made by Appellee and Appellant's purported acceptance of that offer after the trial court entered summary judgment in favor of Appellee on all of Appellant's claims. Appellee initially made a statutory Offer of Settlement pursuant to O.C.G.A. § 9-11-68 on June 27, 2012. (R-165-66.) In that Offer of Settlement, Appellee offered to pay $100,000.00 to Appellant in settlement of "each and every claim that [Appellant] has made, or that could have been made" in the civil action from which this appeal is taken. (R-165.) Appellee's June 27, 2012 Offer of Settlement was conditioned on a "fully executed release of all claims against" Appellee and dismissal with prejudice of Appellant's claims. (R-165-66.) Appellee's Offer of Settlement stated that it would expire 30 days from the date of service of the letter by certified mail. (*Id.*)

On July 3, 2012, Appellant apparently served Appellee with a counteroffer of settlement also made pursuant to O.C.G.A. § 9-11-68. (Brief of Appellee at 11.)[1] In a letter dated August 2, 2012, Appellee's attorney rejected Appellant's statutory Offer of Settlement but also "reiterate[d] [the] previous offer of One-Hundred Thousand Dollars ($100,000.00) on behalf of" Appellee. (R-167.) The August 2, 2012 letter did not specify any additional terms for the "reiterated" offer other than an amount of money to be paid to settle the case. (*Id.*)

On August 22, 2012, the trial court granted Appellee's motion for summary judgment and directed immediate entry of judgment in favor of Appellee. (Supp. Record Index 1-5.)On August 23, 2012, Appellant's attorney sent a letter to Appellant's attorney stating that "[Appellant] accepts the offer made in your letter dated August 2, 2012." (R-168-69.) Appellee's attorney responded on August 27, 2012, stating that the August 2, 2012 letter was insufficiently certain to allow acceptance or to consummate a contract without further discussion. (R-170-71.) Appellee's attorney further contended that the offer had been rendered "moot" by

[1] Although the July 3, 2012 letter from Appellant's counsel does not appear in the appellate record, there does not appear to be any dispute as to its content or effect.

the trial court's grant of summary judgment to Appellee. (*Id.*) Appellant then filed a Motion to Enforce Settlement (R163-77), which the trial court quickly denied as "ludicrous." (R-179-80.) This appeal followed.

In a letter dated May 8, 2013, this Court requested that the GDLA file an *amicus curiae* brief in this case addressing the following issue:

> Whether the trial court erred in ruling that its grant of summary judgment to the defendant rendered the defendant's offer of settlement moot. See O.C.G.A. § 9-11-68. *Cf.* FED. R. CIV. P. 68. See also *Perkins v. U.S. West Communs.*, 138 F.3d 336 (8th Cir. 1998); *Day v. The Krystal Co.*, 241 F.R.D. [474] (E.D. Tenn. 2007); *Kroener v. Fla. Ins. Guar. Assn.*, 63 So.3d 914 (Fla. Dist. Ct. App. 2011); *Hernandez v. United Supermarkets of Okla.*, 882 P.2d 84 (Okla. Ct. App. 1994).

Pursuant to the Court's request, the GDLA has prepared and filed this Brief showing why the GDLA believes the trial court properly held that the grant of summary judgment to Appellee precluded Appellant from accepting Appellee's August 2, 2012 offer of settlement. As it appears the trial court's decision is correct under both O.C.G.A. § 9-11-68 and other applicable Georgia law pertaining to settlement agreements, all such issues are analyzed herein. See *Aimwell, Inc. v.*

McLendon Enters., Inc., 318 Ga. App.394, 400 (2) (2012) (judgment of lower court will be affirmed if right for any reason, even if lower court's decision is based on erroneous theory of law or application of law to fact). In accordance with this Court's request, this Brief concerns only the issues surrounding the Motion to Enforce Settlement filed by Appellant in the court below and does not address any issues pertaining to the granting of Appellee's Motion for Summary Judgment.

A. The August 2, 2012 letter from Appellee's counsel was not a statutory Offer of Settlement under O.C.G.A. § 9-11-68.

As an initial matter, based on the plain language and meaning of O.C.G.A. § 9-11-68, the August 2, 2012 letter from Appellee's counsel did not constitute an Offer of Settlement under that statute. In order to qualify as an Offer of Settlement under that statute, any purported offer must satisfy eight specific requirements:

(1) Be in writing and state that it is being made pursuant to this Code section;

(2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;

(3) Identify generally the claim or claims the proposal is attempting to resolve;

(4) State with particularity any relevant conditions;

(5) State the total amount of the proposal;

(6) State with particularity the amount proposed to settle a claim for punitive damages, if any;

(7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and

(8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5.

O.C.G.A. § 9-11-68(a).

In this case, while the August 2, 2012 letter from Appellee's counsel stated the total amount of the proposal and arguably identified the parties and claims involved in the offer, as required by O.C.G.A. § 9-11-68(a)(2), (3), and (5), none of the other five requirements of O.C.G.A. § 9-11-68(a) was satisfied. In particular and most obviously, the August 2, 2012 letter contained no statement that it was being made pursuant to O.C.G.A. § 9-11-68(a), and the letter reflects that it was sent via facsimile and e-mail only, not by certified mail or statutory overnight

delivery as required under the statute. See O.C.G.A. § 9-11-68(a)(1), (a)(8).(R-167.) Accordingly, by the express language of O.C.G.A. § 9-11-68, Appellee's August 2, 2012 letter was not a statutory Offer of Settlement.

The history of negotiations between the parties as established in the record also indicates Appellee did not intend to make a statutory Offer of Settlement via the August 2, 2012 letter. Appellee clearly was aware of the requirements of O.C.G.A. § 9-11-68(a) and complied with them in making its statutory Offer of Settlement on June 27, 2012, so the absence of the required language and the failure to serve the August 2, 2012 letter in the manner required by O.C.G.A. § 9-11-68(a)(8) shows there was no intention on the part of Appellee to make a second Offer of Settlement pursuant to O.C.G.A. § 9-11-68.

Moreover, the very purpose and effect of serving an Offer of Judgment pursuant to O.C.G.A. § 9-11-68 indicate that there was no intention on the part of Appellee for the August 2, 2012 letter to constitute a statutory Offer of Settlement. See *MPP Invs., Inc. v. Cherokee Bank, N.A.*, 288 Ga. 558, 562 (3) (2011) ("Where the language of a contract is undisputed, but the meaning of that language is in dispute, it remains the duty of the court to look to the language of the contract with a view to effectuating the intent of the parties." (internal brackets and punctuation

omitted)).The established purpose of O.C.G.A. § 9-11-68 is to "encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation." *Smith v. Baptiste*, 287 Ga. 23, 29 (2) (2010). O.C.G.A. § 9-11-68 accomplishes that purpose by providing that where an offeree rejects an offer made under the statute and a judgment is subsequently entered in the case that is above or below an established threshold (depending on whether the offeror is the plaintiff or defendant), the offeree will be required to pay the attorney's fees and expenses of litigation incurred by the offeror from the date of rejection of the offer until the entry of judgment. O.C.G.A. § 9-11-68(b).Making a subsequent statutory Offer of Settlement does not diminish the right of an offeror to recover fees and expenses under an earlier statutory Offer that was rejected. *Great W. Cas. Co. v. Bloomfield*, 303 Ga. App. 26 (2010).

The practical significance is that there would be absolutely no purpose to serving a second Offer of Settlement pursuant to O.C.G.A. § 9-11-68 just a few weeks later and with no significant change in circumstances in the case. The offeror already would have "locked in" the right to recover fees and expenses from the date of rejection of the initial offer, and there would be nothing to be gained by making a second statutory Offer. If the offeror wanted to make a renewed effort to

settle the case for the same amount offered previously, the offeror simply would make a new, non-statutory offer of settlement. There could be no possible purpose to extending a second statutory Offer of Settlement pursuant to O.C.G.A. § 9-11-68 in the same amount as the first, and neither the trial court nor this Court should ascribe such an illogical reading to Appellee's offer in this case.

B. The trial court did not err in holding that Georgia law does not permit a party to allow a case to proceed to judgment and subsequently accept an opposing party's earlier offer of settlement.

Whether the August 2, 2012 letter is interpreted as a statutory Offer of Settlement made under O.C.G.A. § 9-11-68 or a garden-variety settlement offer, the GDLA believes the trial court did not err in denying the Appellant's motion to enforce the purported settlement. The GDLA urges this Court not to interpret O.C.G.A. § 9-11-68 in a way that would permit a party, after summary judgment is granted against him, to accept an earlier-made statutory Offer of Settlement. Rather, the GDLA respectfully submits that the more fair and reasonable view, and the one that should be adopted by this Court, is that an Offer of Settlement made pursuant to O.C.G.A. § 9-11-68 automatically expires or is mooted by a

subsequent grant of summary judgment. Similarly, unless the parties specifically contract to permit acceptance of a non-statutory offer of settlement after the accepting party's claims have been disposed of by a grant of summary judgment, the courts should not impose such a strained, illogical interpretation of Georgia law on any settlement agreement.

There does not appear to be any reported Georgia case addressing the effect of a grant of summary judgment while an O.C.G.A. § 9-11-68 Offer of Settlement is pending. In interpreting other jurisdictions' offer of settlement statutes, however, a few foreign courts have interpreted those statutes as requiring any offer made pursuant to the statute be left open for the time provided in the statute, regardless of whether summary judgment is entered after the offer is made but before the statutorily-required time for the offer has elapsed. See, e.g., *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942 (Colo. 1993) (interpreting Colorado offer of judgment statute); *Hernandez v. United Supermarkets of Okla.*, 882 P.2d 84 (Okla. Ct. App. 1994) (interpreting Oklahoma offer of judgment statute); *Perkins v. U.S. West Communs.*, 138 F.3d 336 (8th Cir. 1998) (interpreting FED. R. CIV. P. 68).

Notably, the language of Federal Rule 68, regarding Offers of Settlement in the federal courts, is substantially different from that of O.C.G.A. § 9-11-68. In

particular, Federal Rule 68 provides no mechanism for revocation or withdrawal of an offer made pursuant to that provision. See FED. R. CIV. P. 68. Similarly, the Oklahoma statute interpreted in *Hernandez v. United Supermarkets* does not provide for revocation or withdrawal of an offer of settlement made under that statute. See 12 OKLA. STAT. § 1101.[2] By contrast, O.C.G.A. § 9-11-68

[2] In *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942 (Colo. 1993), the Supreme Court of Colorado held that an offer made pursuant to that state's Offer of Settlement statute was not superseded by summary judgment. In response to the *Hufnagel* decision, Colorado's legislature amended the offer of settlement statute to permit parties to "withdraw" settlement offers made pursuant to that statute. See *Rost v. Atkinson*, 292 P.3d 1041 (Colo. Ct. App. 2012); COLO. REV. STAT. § 13-17-202(1)(a)(V). The Colorado Court of Appeals recently held that the Colorado statute still does not permit an offer made under the statute to be superseded by summary judgment because the statute does not explicitly provide as such and because Colorado law provides generally that "a settlement agreement supersedes a judgment and, so long as the agreement exists, the judgment merges into it and is thereby extinguished." *Rost*, 292 P.3d at 1042.

specifically permits revocation of an Offer of Settlement by the offeror within the time period set forth in the Offer of Settlement: "Any offer made under this Code section shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree…." O.C.G.A. § 9-11-68(c).

In any event, even under the more restrictive language of Federal Rule 68, several courts have reached the more logical and reasonable holding that the grant of summary judgment renders an earlier Rule 68 Offer of Settlement moot and incapable of being accepted thereafter. Those courts have reasoned that "when the Court enters a final judgment in favor of [the] defendant, the Court ends the litigation, and the need for settlement is no longer present," and, thus, the plaintiff cannot subsequently "accept" a prior statutory offer of judgment. *Smith v. S.E. Pa. Transp. Auth.*, 258 F.R.D. 300, 302 (E.D. Pa. 2009) (internal brackets omitted). See also *Sershen v. Cholish*, 2010 U.S. Dist. LEXIS 39165, *6-7 (M.D. Pa. Apr. 20, 2010); *Day v. The Krystal Co.*, 241 F.R.D. 474 (E.D. Tenn. 2007). Similarly, the Court of Appeals of Arizona has held that a trial court's entry of summary judgment "nullifies" an offer of settlement under Arizona Rev. Stat. § 12-2101(B), the Arizona statutory analog to Federal Rule 68. *Wersch v. Radnor/Landgrant*, 961 P.2d 1047 (Ariz. Ct. App. 1997). And the Florida Court of Appeal recently

rejected a plaintiff's argument that a settlement offer made under the Florida offer of judgment statute could not be accepted after summary judgment had been granted on the plaintiff's claims, notwithstanding that the statutory time period the offer was required to remain open had not yet elapsed. *Kroener v. Fla. Ins. Guar. Assn.*, 63 So. 3d 914 (Fla. Dist. Ct. App. 2011). See also FLA. STAT. § 768.79(1).

As one federal district court explained in holding that the court's grant of summary judgment superseded and destroyed the losing party's ability to accept an Offer of Judgment pursuant to Federal Rule 68:

> When a district court grants summary judgment in favor of the offering party, it enters judgment in favor of that party. At that point, the defendant can no longer offer a judgment because a judgment has already been entered by the district court. As such, the defendant's Rule 68 offer becomes a nullity with respect to that party. The defendant can no longer offer judgment to [the plaintiff] "on specified terms" as prescribed by Rule 68 because the terms of the judgment have already been decided by the district court when rendering its summary judgment opinion. To hold otherwise would create a scenario where there were two competing judgments: the summary

> judgment entered in favor of the defendant by the district court, and the judgment offered by defendant and accepted by plaintiff after the court has entered summary judgment. The judgment of the Court is paramount as the case against [the defendant] is over and there is nothing to resolve by way of the Judgment.

Sershen, 2010 U.S. Dist. LEXIS 39165, *6-7. See also *Wersch*, 961 P.2d at 1050 (holding that "[t]he better interpretation of [Arizona] Rule 68 is that it does not allow a party to nullify a summary judgment").

Similarly, another federal district court observed that "since summary judgment had already been entered and the case had come to an end, permitting the second judgment [purportedly accepting the Rule 68 Offer of Settlement] to stand would in no way effectuate the purpose of Rule 68, which is to encourage settlement, and would not secure the just, speedy, and inexpensive determination of the action." *Smith*, 258 F.R.D. at 302 (brackets supplied; internal brackets and punctuation omitted). To the contrary, permitting a party to accept a statutory offer of judgment after the trial court has granted summary judgment against that party "would frustrate the purpose of [the Offer of Settlement statute] to encourage settlement, obviate the necessity of protracted litigation, and totally defeat the ends

of justice and allow a mockery of the judicial system." *Kroener*, 63 So. 3d at 920 (internal quotation omitted).

Consistent with the weight of authority in the federal and state courts that have considered the issue as applied to Federal Rule 68 or their respective state offer of settlement/judgment statutes, the GDLA urges this Court to hold that an Offer of Settlement under O.C.G.A. § 9-11-68 is nullified or mooted by a grant of summary judgment. If the August 2, 2012 letter from Appellee's attorney amounted to a standard, non-statutory settlement offer, and not an Offer of Settlement within the auspices of O.C.G.A. § 9-11-68, this Court should reach the same result. The reasoning followed in the *Sershen*, *Wersch*, *Smith*, *Day*, and *Kroener* cases cited above applies equally well to a non-statutory settlement offer. As the federal district court reasoned in *Sershen*, "[t]he judgment of the Court is paramount as the case against [the defendant] is over and there is nothing to resolve by way of" the purported acceptance of an earlier settlement offer. 2010 U.S. Dist. LEXIS 39165, *6-7. Whether under O.C.G.A. § 9-11-68 or otherwise, Georgia law cannot be interpreted logically as permitting a party to accept an offer of settlement *after* the trial court has entered summary judgment on the claims that were the subject of the offer.

This conclusion is supported by Georgia law regarding the effect of summary judgment generally. This Court has held that "[g]ranting a summary judgment is a decision on the merits and ends the case." *Nelson v. Bd. of Regents of the Univ. Sys. of Ga.*, 307 Ga. App. 220, 228 (2) (2010). See also *Gaskins v. A. B. C. Drug Co.*, 183 Ga. App. 518, 519 (3) (1987); *Int'l Indem. Co. v. Reeves*, 170 Ga. App. 391, 392 (1) (1984). Entry of summary judgment is "the end of the matter," and "[a] party against whom summary judgment has been granted is in the same position as if he suffered a verdict against him." *Kight v. Behringer*, 192 Ga. App. 62, 63 (1989); *Summer-Minter & Assocs., Inc. v. Giordano*, 231 Ga. 601, 604 (1973).

That is not changed by the fact that a plaintiff has the right to appeal the trial court's grant of summary judgment against him. The legal effect of the reversal on appeal of a judgment entered by the trial court is to nullify the trial court's judgment and to place the parties in the same position they occupied before judgment was entered. *Franklyn Gesner Fine Paintings, Inc. v. Ketcham*, 259 Ga. 3, 4 (6) (1989); *Kirkland v. S. Disc. Co.*, 187 Ga. App. 453, 456 (3) (1988). Until that potential appeal and reversal occur, however, the plaintiff's claims remain extinguished.

Permitting a party to "accept" an opposing party's settlement offer after the claims to be settled are disposed of by summary judgment would be patently unreasonable and would serve to discourage settlement discussions and offers. See *Smith*, 258 F.R.D. at 302; *Kroener*, 63 So. 3d at 920. Indeed, permitting acceptance of an offer of settlement after a grant of summary judgment would *extend* the case and would use additional judicial resources, as plaintiffs likely would elect to wait out the trial court's ruling on pending motions for summary judgment. See *Kroener*, 63 So. 3d at 920. Such a holding, thus, would not serve the stated purpose of O.C.G.A. § 9-11-68, nor would it further Georgia's public policy favoring settlement of questionable claims. See *Torres v. Elkin*, 317 Ga. App. 135 (2012).

In this case, when the trial court granted summary judgment to Appellee on August 22, 2012, the court disposed of Appellant's claims and the entire case below. Since the case was over, any offer conveyed on August 2, 2012 for settlement of the case was nullified or rendered moot and, thus, could not have been accepted by Appellant on August 23, 2012. Appellant knew Appellee's motion for summary judgment was pending when Appellant rejected Appellee's June 27, 2012 offer and when Appellee made its August 2, 2012 "reiterated" offer.

Appellant presumably hoped or expected that the court would deny Appellee's motion, but by rejecting the first offer and ignoring the second until after the trial court had ruled on Appellee's motion for summary judgment, Appellant ran the risk that the court would grant the motion. That risk was realized prior to Appellant's purported acceptance of the August 2, 2012 offer, when the trial court granted Appellee's motion. Having knowingly accepted the risk, Appellant should not be permitted to force Appellee to honor its earlier offer after the trial court ended the case by granting summary judgment to Appellee.

C. The August 2, 2012 letter from Appellee's counsel and the August 23, 2013 letter from Appellant's counsel did not create an enforceable settlement agreement because there was an absence of mutuality and a failure of consideration, and because Appellant failed to satisfy his burden of proving the existence and essential terms of the purported agreement.

In addition, under the facts of this specific case, Appellant's purported "acceptance" of the offer was ineffective because the prerequisites for a binding settlement agreement under Georgia law were not satisfied. Specifically, the purported settlement agreement failed for lack of mutuality or assent to the

essential terms of the contract. In addition, the trial court's grant of summary judgment on Appellant's claims destroyed the contemplated consideration for the proposed settlement agreement. Accordingly, the purported settlement agreement failed as a matter of law, and the trial court did not err in refusing to enforce it.

Georgia law provides that in considering whether an enforceable settlement has occurred, although settlement is favored as being supported by public policy, "courts are certainly limited to "those terms upon which the parties themselves have mutually agreed." *Torres v. Elkin*, 317 Ga. App. 135, 140-41 (2) (2012); *Herring v. Dunning*, 213 Ga. App. 695, 696-97 (1995). Settlement agreements must meet the same requirements regarding formation and enforceability as other contracts, and absent mutual agreement on the required terms, no enforceable settlement agreement exists. *Torres*, 317 Ga. App. at 141; *Greenwald v. Kersh*, 275 Ga. App. 724, 725-26 (2005). The party asserting the existence of a settlement agreement bears the burden of proving the agreement's existence and terms. *Torres*, 317 Ga. App. at 141.

Four requirements are required to constitute a valid contract: (1) parties able to contract, (2) consideration moving to the contract, (3) assent of the parties to the terms of the contract, and (4) subject matter on which the contract can operate.

O.C.G.A. § 13-3-1. Before a contract may be deemed enforceable, each of the four essential terms must be shown to be "of such certainty and completeness that either party may have a right of action upon" the purported contract. *Laverson v. Macon Bibb County Hosp. Auth.*, 226 Ga. App. 761, 762 (1997); *Jackson v. Williams*, 209 Ga. App. 640, 642-43 (1) (1993). "The requirement of certainty extends not only to the subject matter and purpose of the contract, but also to the parties, consideration, and even the time and place of performance where these are essential." *Id.* "A contract cannot be enforced in any form of action if its terms are incomplete or incomprehensible." *Id.* See also *Millwood v. Art Factory, Inc.*, 306 Ga. App. 164, 166 (2010) ("The requisites of an explicit contract are a meeting of the minds of the parties, mutuality, and the clear expression of the terms of the agreement.").

Moreover, "an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject-matter, and in the same sense." *Cox Broadcasting Corp. v. Nat'l Collegiate Athletic Assn.*, 250 Ga. 391, 395 (1982) (emphasis supplied). "When parties to a contract…know that they have different intents with respect to certain language before they enter into the contract, there can be no meeting of the minds upon the same subject matter

and in the same sense and no agreement on that issue." *Id.* at 396. In the recent case of *Frickey v. Jones*, 280 Ga. 573 (2012), which also involved a motion to enforce a purported settlement agreement, the Supreme Court of Georgia reaffirmed that "[i]n 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 manifestations of assent." *Id.* at 575.

In this case, Appellee's first settlement offer reflects that Appellee intended that the offer, if accepted, would result in release, settlement, and extinguishment of "each and every claim that [Appellant] ha[d] made, or that could have been made, or that could have been made in [this case] against [Appellee], as well as any claims which ha[d] arisen between the parties during the course of this litigation." (R-165.) The June 27, 2012 offer also recited that it was intended as a "fair and reasonable [offer] to settle [Appellant's] claims against [Appellee]" and was based on Appellee's belief that Appellant would "run[] a significant risk incurring [Appellee's] additional attorney's fees and expenses if the offer [were] not accepted." (R-166.)

The "renewed" offer of settlement did not contain any additional expression or indication of Appellee's intent in making that offer. (R-167.) Appellee's counsel's letter dated August 27, 2013 clearly reflects that Appellee did not intend the offer remain open for acceptance after the trial court's grant of summary judgment. (R-170-71.) Notably, neither Appellee's June 27, 2012 Offer of Settlement nor the August 2, 2012 letter from Appellee's attorney referenced any potential appeal of Appellant's claims. (R-165-67.)

On appeal, Appellant contends that "[t]he consideration for the settlement is not only the exchange of $100,000 for a release of liability, but also the cessation of litigation, including the absence of this appeal of the order granting summary judgment and the concomitant possibility that it could get reversed." (Brief of Appellant, pp. 17-18.) Appellant contends, likewise, that the subject matter of the purported settlement agreement is "the exchange of $100,000 for a release of liability and the cessation of litigation." (Id. at 18.) Appellant has not been able to produce any writing or purported conversation between the parties, however, that would indicate that Appellee had any intention of resolving a potential appeal, in contrast with the very specific language in the June 27, 2012 letter about the nature of the claims to be resolved under the initial offer. In addition, Appellee's August

2, 2012 offer could not have contemplated the "possibility that [the Order granting summary judgment to Appellee] could get reversed" since that Order had not yet been entered.

Even if Appellant's asserted interpretation of the August 2, 2012 offer and purported agreement is presumed to be reasonable, there was no mutual assent or "meeting of the minds" of Appellant and Appellee. Appellee believed it was offering to settle, and intended to settle, Appellant's claims arising from the subject incident. But at the time of Appellant's purported "acceptance" of the offer, the parties could not have been settling Appellant's claims, which had been disposed of by the trial court's grant of summary judgment to Appellee. See *Nelson*, 307 Ga. App. at 228 (2); *Kight*, 192 Ga. App. at 63; *Giordano*, 231 Ga. at 604.

A reasonable man in Appellant's position would not have believed that Appellee was offering to pay $100,000.00 to settle claims that might no longer be pending at the time of Appellant's acceptance. See *Frickey*, 280 Ga. at 575 (describing objective standard to be applied in determining whether there was required "meeting of the minds" on settlement agreement). Stated another way, nothing contained in Appellee's counsel's letters of June 27, 2012 and August 2, 2012 could have given Appellant the reasonable belief that Appellee intended to

pay $100,000.00 to settle the specific claims pending when the offer was made *or* to settle Appellant's right to appeal the trial court's grant of summary judgment, which did not arise until after Appellee's offer was made, in the event that contingency came to pass. Such an interpretation would graft additional terms onto Appellee's offer that from the plain language of the operative writings were never considered or discussed by the parties.

The conclusion that there was no mutual assent to settle only Appellant's right of appeal for $100,000.00 is supported by the fact that the amount of the August 2, 2012 offer was the same as the June 27, 2012 offer. The June 27, 2012 offer would have expired under its own terms before Appellee's motion for summary judgment could have been ruled on by the trial court. As a result, in order to find that there was mutual assent, the Court would have to ascribe to Appellee the illogical belief that Appellant's claims had the same settlement value after summary judgment had been granted against Appellant as while Appellee's motion was pending.

Similarly, because summary judgment was granted to Appellee prior to Appellant's purported acceptance of Appellee's settlement offer, there was a fatal lack of consideration for the purported agreement. It is well established as a matter

of Georgia law that a contracting party may not materially alter the consideration called for under the contract. See *Dennard v. Freeport Minerals Co.*, 250 Ga. 330, 333, fn. 2 (1) (1982). Similarly, a contract fails for lack of consideration where the intended subject of the contract is lost, changed, or destroyed prior to completion of the required terms of the contract. See, e.g., *Deadwyler & Co. v. Karow & Forrer*, 131 Ga. 227, 232 (1908) (holding that contract for sale of cotton failed for lack of consideration where price was to be determined by weighing cotton after delivery, and although cotton had been delivered, it was destroyed by fire before it could be weighed). The common theme in these cases is that where parties have bargained for a particular type and degree of consideration, an alteration in that consideration will render the agreement invalid or constitute a breach.

In this case, the consideration for Appellee's offer, as stated in the June 27, 2012 letter from Appellee's counsel, was dismissal with prejudice and release of "each and every claim that [Appellant] has made, or that could have been made" in the civil action from which this appeal is taken. (R-165.) Once summary judgment had been entered, Appellant had no remaining claims to settle or release, so there was no consideration for the purported agreement urged by Appellant in

his appeal. See *Nelson*, 307 Ga. App. at 228 (2); *Kight*, 192 Ga. App. at 63; *Giordano*, 231 Ga. at 604. See also *Sershen*, 2010 U.S. Dist. LEXIS 39165, *6-7.

This is not to say that a party to a lawsuit could not make a settlement offer that specifically would remain open after summary judgment is entered against the party, or that parties could not enter into a binding agreement, perhaps similar to a "high-low" agreement, that would provide for particular outcomes depending on how a trial court might rule on a pending dispositive motion. But there is no evidence before this Court that there was a meeting of the minds between the parties to create such an agreement in this case. Accordingly, the trial court correctly denied Appellant's motion to enforce the purported settlement.

Furthermore, the purported settlement agreement, and Appellant's appeal of the trial court's denial of his motion to enforce the purported settlement, fail as a matter of law because Appellant has not carried his burden of establishing the specific settlement agreement to be enforced. Where "the existence of a binding agreement is disputed, the proponent of the settlement must establish its existence in writing." *Imerys v. Washington*, 287 Ga. App. 674, 675 (2007); *Herring v. Dunning*, 213 Ga. App. 695, 697 (1994). While "[t]he writing which will satisfy this requirement ideally consists of a formal written agreement signed by the

parties…letters or documents prepared by attorneys which memorialize the terms of the agreement reached will suffice." *Id.* "[I]f the parties disagree on whether an agreement was reached, the agreement must be memorialized in a writing to be enforceable, and the absence of a writing prevents enforcement." *Imerys*, 287 Ga. App. at 675; *Moreno v. Strickland*, 255 Ga. App. 850, 852 (1) (2002). "If the offer is in any case so indefinite as to make it impossible for a court to decide just what it means, and to fix the legal liability of the parties, its acceptance can not result in an enforceable agreement." *Herring*, 213 Ga. App. at 697; *Poulos v. Home Fed. Sav. & Loan Assn.*, 192 Ga. App. 501, 502 (2) (1989).

In this case, it is clear based on the letters between counsel for Appellant and Appellee that there is a disagreement as to whether an agreement was reached. The letter sent by Appellee's attorney just four days after Appellant's purported acceptance of the August 2, 2012 offer calls into question whether there was an agreement and, if so, the specific terms of the agreement. Given the vagueness of the August 2, 2012 offer and the resultant uncertainty as to the terms of the agreement after Appellant's purported acceptance on August 23, 2012, it would appear that the offer was "so indefinite as to make it impossible for a court to decide just what it means." *Herring*, 213 Ga. App. at 697. Since Appellant failed

to prove the terms of the purported agreement to a satisfactory degree, Appellant's purported acceptance did not result in an enforceable settlement agreement. *Id.*

Finally, Appellant's argument runs counter to well-established principles of Georgia law regarding the time in which a settlement agreement may be accepted. Georgia law provides that if an offer does not contain a specified expiration date, the offer must be accepted within a reasonable time. *Wilkins v. Butler*, 187 Ga. App. 84, 84 (1988); *Prior v. Hilton & Dodge Lumber Co.*, 141 Ga. 117, 118 (1913). "What constitutes a reasonable time in any given case must depend upon its own peculiar facts." *Wilkins*, 187 Ga. App. at 84; *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 25 (1924).

Turning to the facts of this case, contrary to Appellant's argument on appeal, the August 2, 2012 letter from Appellee's counsel does not contain a specific deadline for acceptance of the "reiterated" offer. (R-167.) Given that a motion for summary judgment was pending at the time the offer was made, however, it is clear that a "reasonable time" for acceptance of Appellee's settlement offer would have been prior to the trial court's grant of Appellee's motion for summary judgment. Certainly it does not seem "reasonable" to permit a party to accept a settlement offer after the claims purported to be settled by the offer had been

disposed of by a grant of summary judgment to the offeror. Accordingly, Appellant's purported acceptance of Appellee's August 2, 2012 offer was ineffective, and the trial court did not err in denying Appellant's motion to enforce the purported settlement.

III. CONCLUSION

For the foregoing reasons, the GDLA respectfully submits that this Court should affirm the trial court's denial of Appellant's Motion to Enforce Settlement.

Respectfully submitted this 4th day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** in the above-listed case on all parties by depositing a copy of same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

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