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 TRIAL LAWYERS ASSOCIATION

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I. INTRODUCTION

A. Statement Of Interest

The Georgia Trial Lawyers Association ("GTLA") is a membership association composed of more than 2,000 lawyers committed to preserving the jury system and representing those injured by the wrongdoing of others. The issue under review in this case affects every citizen in Georgia who has an interest in finalizing disputes and settling cases during any stage of litigation. GTLA's interests as lawyers for the offeror or offeree are no different than those espoused by every litigant and every court. These interests include following the law as written by the legislature, ending litigation (including appeals), encouraging settlement, and preserving the freedom to contract. In addition to fulfilling these interests, GTLA is responding to a request conveyed by the Clerk of Court to submit this *amicus curiae* brief. GTLA is grateful for the request and honored to assist the Court on this question or any other matter.

B. Question Presented To GTLA

Whether the trial court erred in ruling that its grant of summary judgment to the defendant rendered the defendant's offer of settlement moot?

C. Summary Response

Yes. The plain language of O.C.G.A. § 9-11-68(a)(4) allows an offeror to add to the offer "any relevant conditions." In this case, the offeror filed a motion for summary judgment. The offeror knew its motion was pending when it made its first offer on June 27, 2012. The offeror knew its motion was ripe when it made its second offer on August 2, 2012. Neither offer stated that a ruling on the motion for summary judgment was a "relevant condition" to acceptance. Furthermore, an offeror is free to withdraw an offer at any time for any reason. O.C.G.A. § 9-11-68(c). In this case, the offeror did not withdraw the second 30-day offer before it was accepted. Accordingly, assuming the second offer was a valid statutory offer, there was a settlement under O.C.G.A. § 9-11-68.

GTLA respectfully suggests, however, that O.C.G.A. § 9-11-68 is irrelevant to this case. The August 2 "reiterated" offer did not comply with O.C.G.A. § 9-11-68 and is not governed by that statute. Rather, the August 2 reiterated offer is governed by the common law of "offer and acceptance." The August 2 offer "reiterated" – or repeated – terms from the June 27 offer. The reiterated offer was not conditioned on a ruling on the pending motion, and the offeree accepted before it expired or was withdrawn. The parties formed a valid contract of settlement.

II. REASONING AND CITATION TO AUTHORITY

A. The plain language of O.C.G.A. § 9-11-68 does not state that an offer is mooted by a grant of summary judgment.

Georgia's offer of settlement statute is detailed and lengthy. *See*, O.C.G.A. § 9-11-68. Subsection (a) exhaustively itemizes the timing and contents of an offer. Subsection (b) carefully explains the consequences of rejection. Subsection (c) describes how long an offer remains open and the manner of withdrawal, rejection and counteroffer. Subsections (d) and (e) provide particulars regarding other aspects. Nowhere does O.C.G.A. § 9-11-68 suggest that an offer is mooted, extinguished or rendered incapable of acceptance by any ruling of the trial court.

"The cardinal rule of statutory construction requires this Court to look diligently for the intention of the General Assembly, and the 'golden rule' of statutory construction requires us to follow the literal language of the statute unless it produces contradiction, absurdity, or such an inconvenience as to insure that the legislature meant something else." *Judicial Council of Georgia v. Brown & Gallo, LLC*, 288 Ga. 294, 296-97 (2010) (internal citations and punctuation removed). "The fundamental rules of statutory construction require us to construe a statute

according to its terms, to give words their plain and ordinary meaning." *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 362 (2012).

"A court cannot by construction add to, take from, or vary the meaning of unambiguous words in the statute." *Gordon v. Atlanta Cas. Co.*, 279 Ga. 148, 149 (2005), *superseded by statute*, *Dees v. Logan*, 282 Ga. 815 (2007). In *Gordon*, an insurance policy provided uninsured motorist coverage for bodily injury "sustained by a covered person and caused by an accident." *Id*. at 148. The insured's son died in an accident caused by an uninsured motorist, but the insured's son was not "a covered person." At the time, Georgia's uninsured motorist statute provided that an automobile insurance policy issued in Georgia and providing uninsured coverage shall contain "an endorsement or provisions undertaking to pay the insured all sums which said insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." *Id*. at 148-49.

The issue for the *Gordon* Court was whether the insured father could collect uninsured motorist benefits to compensate him for the damages he suffered as his uninsured son's survivor. If the words in the policy controlled, the father could not recover because he suffered no bodily injury. If the statute controlled, he could recover because he was seeking to recover for bodily injury (to his son) caused by

an accident. The Court ruled that the plain language of the statute required the carrier to provide coverage to the father for damages caused by his son's death.

The *Gordon* Court reasoned that it must construe the statute as written so long as it is not "illogical." *Id*. at 149. The Court rejected the notion that it should read into the statute a legislative intent not clearly set forth in the statute. *Id*. at 149-50. In 2006, the General Assembly responded to the ruling in *Gordon* and amended the statute to specify that the damages must be recoverable for physical injury to the insured and not just damages recoverable by the insured. *Dees v. Logan*, 282 Ga. 815, 819-20 (2007) (Carley J. concurring and explaining that the General Assembly obviously appreciated the significance of the ruling in *Gordon* and amended the statute to alter future outcomes). *Gordon* and *Dees* provide an example of the proper balance between a judiciary that interprets the law as written and a legislature empowered to amend the law to clarify its intent.

O.C.G.A. § 9-11-68 includes no language – much less plain language – indicating that the General Assembly intended a grant of summary judgment to render an offer incapable of acceptance. The language states an offer of settlement "**shall** remain open for 30 days unless sooner withdrawn." O.C.G.A. § 9-11-68(c)

(emphasis added). A court would have to ignore the word "shall" to rule that summary judgment renders an offer of settlement incapable of acceptance.

The General Assembly provided for three scenarios under which an offer of settlement would not remain open for 30 days: withdrawal, counteroffer, or rejection. O.C.G.A. § 9-11-68(c) (commanding that the offer "shall remain open for 30 days **unless** sooner withdrawn" or there is a counteroffer or written rejection) (emphasis added). The "automatic mooting rule" urged by appellees would write into the statute a fourth exception to the 30-day period that the General Assembly did not include. It would have been easy for the General Assembly to state that an offer of settlement "shall remain open for 30 days unless sooner withdrawn or the trial court grants a motion that disposes of the entire action." The General Assembly included no such language. *See*, *Couch*, 291 Ga. at 362 (noting that if the legislature intended for intentional torts to be excluded from the apportionment statute, "it would have expressly said as much").

This Court has previously refused to import to the statute at issue words the General Assembly chose not to include. *Great West. Cas. Co. v. Bloomfield*, 303 Ga. App. 26, 30 (2010). In *Great West*, the defendant made an offer under O.C.G.A. § 9-11-68 that was rejected. The defendant later made an oral offer at

trial that did not comply with O.C.G.A. § 9-11-68. A defense verdict was rendered, and the defendant sought fees and expenses because of rejection of the statutory offer. The plaintiff argued that the second offer negated the statutory offer. This Court disagreed, reasoning as follows: "If the General Assembly had intended to so limit a party's entitlement to costs and fees under the statute, it could have explicitly stated that intent within the statutory framework." *Id*. If the General Assembly had intended an offer to be automatically mooted by a ruling on summary judgment, it could have explicitly stated that intent.

B. The "automatic mooting rule" is unnecessary, unwise and would disturb the balance created by the statute.

1. The statute requires the offer to specifically state "any relevant condition," which includes decisions made on pending motions.

The statute mandates that "[a]ny offer under this Code section must . . . [s]tate with particularity any relevant conditions." O.C.G.A. § 9-11-68(a)(4). "Any relevant condition" includes future, highly predictable events such as rulings on pending motions. The statute not only *allows* the offeror to make a ruling on a pending motion a relevant condition, the statute *requires* the offeror to do so "with

particularity." A judicially made rule that automatically adds a condition intrudes on the offeror's right to decide what conditions to include and interferes with the offeror's obligation to do so with particularity.

The June 27, 2012, offer is detailed and includes numbered paragraphs as a clear guide to the offeror's chosen conditions. It describes the parties, explains the claims to be resolved, discusses the release, seeks assurances as to the entitlement of nonparties, requires a dismissal with prejudice, states the amount offered, requires confidentiality, specifies an allocation of punitive damages, explains what happens to fees and costs, and allows 30 days for acceptance. The offeror knew its motion was pending when it made the offer. There is no reason the offeror could not have set forth the condition that the offer would be automatically withdrawn if the trial court granted the pending motion.

At the time of the August 2 "reiteration," the offeror had received the plaintiff's response to the motion for summary judgment. The offeror knew the motion was ripe and capable of decision at any moment. The longer a motion is pending, the more likely it is to be ruled upon. Even with this additional information, the August 2 reiteration reveals no desire to make any offer contingent on a ruling by the trial court.

From the collective years of its membership's experience, GTLA is able to inform the Court that offerors (both plaintiffs and defendants) regularly make settlement offers contingent on the outcome of a pending motion, *if that is what the offeror wants to do in a particular situation*. In this particular situation, the offeror filed a motion for summary judgment. A week later, the offeror decided to prepare an offer with many conditions, except the condition the offeror now wants this Court to insert. Subsection (a)(4) allows a party to craft an offer of settlement that is automatically rendered moot by a grant of summary judgment. The offeror easily could have added such a condition to the June 27 offer or to the August 2 reiteration. If this Court were to hold that a grant of summary judgment renders offers incapable of acceptance, the Court would not only be rewriting the statute, the Court would be blue-penciling offers that include no such condition.

2. The plain language allows an offer to be withdrawn at any time.

The statute states that an offer of settlement "shall remain open for 30 days **unless sooner withdrawn**." O.C.G.A. § 9-11-68(c) (emphasis added). The plain language allows a party to withdraw an offer at any time, for any reason or for no reason at all. The statute allows a party to withdraw an offer if the trial court rules

on a pending motion. The corollary is also true; and the statute allows a party to *leave in place* an offer if the trial court rules on a pending motion. The "automatic mooting" urged by the defendant would override the plain meaning of the statute.

The offeror could have withdrawn the June 27 offer or the August 2 reiteration at any time, including after the trial court ruled and before the offeree accepted. While it remains to be seen which party receives the better deal by settling this wrongful death case for $100,000,[1] litigation often leads to situations where a change in circumstances allows the swift actor to get the better deal. For example, if there is an open offer to settle litigation involving the negligent manufacture of a vehicle, and safety regulators announce an opinion that the vehicle is unsafe, the swift actor gets a better deal.[2] If there is an open offer to

[1] If this appeal leads to reversal on the second enumeration of error, the plaintiff may have spoken too soon in accepting the reiterated offer, leaving the defendant/offeror with the better deal.

[2] The defective vehicle scenario is no wild hypothetical, as evidenced by recent news surrounding the NHTSA's opinions on certain Jeep models and pending litigation and negotiations by parties currently litigating those issues.

settle litigation involving ownership to land, and a business announces plans for a nearby development that will change the value of the land, the swift actor gets a better deal. In any litigation, an important witness could die, important evidence could be destroyed or the law could unexpectedly change such that the swift actor gets a better deal by withdrawing or accepting a pending offer. In each example, the fact that the swift actor gets the better deal can help or harm the offeror or the offeree, depending on the circumstances. Either party can be the swift actor. If this Court automatically moots all offers upon a grant of summary judgment, only the offeror benefits and never the offeree. In this case, nothing unexpected happened. The motion was ripe. Everyone knew the trial court could rule at any minute. The offeror could have withdrawn the offer at any time but did not.

3. A judicially made "automatic mooting rule" can only help defendants and can never help plaintiffs.

O.C.G.A. § 9-11-68 strikes a delicate balance between plaintiff and defendant. Subsections (a) and (c) are party neutral. Subsection (b) tempts each party with a similar carrot. If private offers made by defendants are automatically mooted by summary judgment rulings, only defendants can benefit and only

plaintiffs can be harmed. The automatic mooting rule will tilt the balance created by the General Assembly.

In cases where a defendant's motion for summary judgment is pending, the rule moots an offer made by the defendant if the same defendant gets a favorable ruling. The case at bar amply illustrates the benefit to the defendant. In the same situation, the automatic mooting rule would presumably moot a pending offer by the plaintiff. Such a mooting would not benefit the plaintiff. If the defendant's motion were denied, the rule would not moot a pending offer by the plaintiff, even if the plaintiff made a relatively low offer in fear that the motion might be granted. The trial court's denial would materially change the parties' positions, and a swift-acting defendant could accept its benefit. The automatic mooting rule cannot create a comparable benefit for the plaintiff.

In cases where a plaintiff's motion for summary judgment is pending, the rule would never apply. Thus, if a plaintiff files a motion for summary judgment that is granted, any pending offer by the plaintiff would not be mooted even though the plaintiff's position has materially changed for the better. The rule only applies to take a defendant's offer off the table when the defendant's position has changed

for the better. This Court should reject the automatic mooting rule and leave the current balance undisturbed.

4. The "automatic mooting rule" promises uncertainty and future litigation.

O.C.G.A. § 9-11-68 creates certainty and ends litigation. The decision by the trial court, if affirmed, will create a new rule of law that will require future litigation to resolve its application in new situations. For example, imagine a lawsuit with allegations that a defendant caused $5,000 in property damage to a vehicle and that the damaged vehicle subsequently caused the wrongful death of a 35-year-old parent and family breadwinner. Imagine further that the defendant files a motion for summary judgment and makes an offer of settlement while the motion is ripe. The trial court denies summary judgment on the property damage claim but grants partial summary judgment on the wrongful death claim, reasoning that the chain of causation was broken by an intervening act.

Is the offer mooted? What if the offer was for $2 million, reflecting uncertainty as to whether the motion would prevail? What if the offer was for $5,000, reflecting confidence in the defense of the wrongful death claim but acknowledging responsibility for the property damage? In either scenario, if there

were a dispute about whether the offer was mooted, would it not make sense for the trial court to evaluate each offer to determine whether the "consideration" for the offer was mooted by the ruling? If so, what is the standard for that evaluation?

What if shortly after the ruling, but still within the 30-day period in O.C.G.A. § 9-11-68(c), the trial court reconsiders and vacates its ruling? Did the automatic mooting rule moot the offer forever? Did reconsideration revive the mooted offer? What if the trial court reconsiders and vacates its ruling outside of the 30-day period? Is the 30-day period tolled?

Finally, imagine a similar lawsuit but with co-defendants. Each defendant submits an offer while dispositive motions are ripe, and the court issues a mixed ruling. It is impossible to predict all resulting scenarios under which an "automatic mooting rule" will confound the situation. The General Assembly designed a straightforward system, and this Court should keep it that way.

C. Considerations supporting the automatic mooting rule in other jurisdictions do not apply in Georgia.

This Court specifically requested that the question presented be answered in light of Fed. R. Civ. P. 68 and cases from other jurisdictions. The cited cases and

the counterparts to O.C.G.A. § 9-11-68 discussed in those cases illustrate why the automatic mooting rule should not apply in Georgia.

The federal rule offers the starkest contrast to its Georgia counterpart. The federal version provides for "an offer to allow judgment," while the Georgia counterpart is a written offer to settle. *Compare*, Fed. R. Civ. P. 68(a) *and* O.C.G.A. § 9-11-68. A rationale for the automatic mooting rule is that an entry of judgment by the trial court should not be undone by a private agreement. That rationale has some basis under a regime in which a party is consenting to an actual judgment. It makes sense that once a trial court enters a judgment, the parties cannot get together to subvert that judgment with one that contradicts it. The rationale has no basis under Georgia's "offer of settlement" regime, because settlement is a private agreement that does not conflict with a previous judgment.

A settlement under the Georgia rule would not, as a Florida Court of Appeals feared, allow a plaintiff to "override a final judgment by accepting an offer of judgment." *Kroener v. Florida Ins. Guar. Ass'n*, 63 So. 3d 914, 919 (Fla. Dist. Ct. App. 2011). Once a trial court enters judgment, the parties may indeed lack the authority to enter a contrary ***judgment***, but the parties should not lack the ability to make a private ***settlement***. Private settlements frequently occur during an

appeal or in lieu of an appeal. Private settlements are common, allowable and encouraged, even if the trial court has entered a public judgment. A public judgment under the federal rule might contradict a previous judgment by the trial court, but a private settlement under the Georgia rule presents no such problems.

Similarly, allowing a private settlement after a public judgment does not harm the "esteem" of the judgment as feared by a federal district court. *Day v. Krystal Co.*, 241 F.R.D. 474, 478 (E.D. Tenn. 2007). The plain language of O.C.G.A. § 9-11-68 expresses no intent to harm, bolster or otherwise address the "esteem" of a judgment. Rather, the plain language esteems settlement and the cessation of litigation, including litigation on appeal. The "automatic mooting rule" devalues settlement and encourages appellate litigation. This case is a good example. This appeal would not exist if the trial court had applied the statute as written and highly valued settlement. This Court should not allow unfounded fear that a trial court's judgment will lose "esteem" to defeat the General Assembly's decision to highly value settlement.

The Florida court was concerned that in the absence of an automatic mooting rule, "no defendant would ever want to make a Rule 68 offer when summary judgment motions are pending." *Kroener*, 63 So. 3d at 921. That

concern does not apply in Georgia, because the defendant is free to make the offer contingent on no ruling by the trial court. O.C.G.A. § 9-11-68(a)(4) (allowing offeror to add to offer "any relevant conditions"). An offer of settlement in Georgia provides greater flexibility than an offer in judgment in other jurisdictions.

Allowing offers to be accepted following a ruling on summary judgment is not "unfair" to the defendant or provide a "windfall" to the plaintiff. *Kroener*, 63 So. 3d at 921. The master of the offer has control over when it files a motion for summary judgment, when it serves a proposal of settlement and whether the proposal includes conditions that keep the offer open (or close it off) following a ruling on a pending motion. With that kind of control, no offeror can be treated unfairly by an acceptance or provide a windfall to the other side.

There is also no reason to be concerned that allowing a plaintiff to accept a pending offer would "cause the [trial] [c]ourt to unnecessarily spend time and resources resolving a motion that would not need to be resolved." *Kroener*, 63 So. 3d at 921, *Day*, 241 F.R.D. at 480. Parties often settle cases only after the trial court has ruled on motions or otherwise indicated its leanings. Rulings and pronouncements that get cases settled are not a waste of time. They are a good use of time. Rulings by the court are information for the parties. More information

encourages parties to settle. The bar and this Court are no strangers to parties settling an appeal after the Notice of Appeal or even after oral argument. The oral argument was not a waste of judicial resources. It was a proper use of judicial resources that educated the parties and allowed a reasonable and informed resolution. Part of a court's job is to rule on motions before it. If a ruling clarifies the attractiveness of a pending offer, the court has done its job.

D. O.C.G.A. § 9-11-68 is irrelevant because the August 2 reiteration does not comply with the statute.

To adequately respond to the question presented, this brief focuses on O.C.G.A. § 9-11-68. The question presented makes sense, as it was brought to this Court in that posture. GTLA respectfully suggests, however, that O.C.G.A. § 9-11-68 does not apply to the August 2 reiteration, and this case is better viewed as a simple case of offer and acceptance governed by the common law.

The plain language of the statute sets forth requirements for an offer of settlement. It must "[i]nclude a certificate of service and be served by certified mail or statutory overnight delivery." O.C.G.A. § 9-11-68(a)(8). The June 27 offer complied. The August 2 reiteration did not, and it is not an offer under O.C.G.A. § 9-11-68. Thus, whether an offer of settlement that complies with the

statute is mooted by a grant of summary judgment is not properly before this Court, and any such ruling would be improvident.

E. Based on simple contract principles, the defendant made an offer and the plaintiff accepted it.

1. The August 2 reiteration was an offer to enter into a settlement agreement.

If a statutory offer is rejected, a subsequent common-law offer need not comply with the statute. *Great West*, 303 Ga. App. 26 (ruling that oral offer that did not comply with O.C.G.A. § 9-11-68 did not supersede earlier offer that did comply). "[A] rejected offer does not put an end to negotiation where the party who made the original offer renews it." *Johnson v. DeKalb Cnty.*, 314 Ga. App. 790, 794 (2012). Rejection of an offer governed by O.C.G.A. § 9-11-68 does not preclude subsequent offers and counteroffers governed by the common law of offer and acceptance. The August 2 reiteration's failure to achieve status as a statutory offer does not render it meaningless.

On June 27, the defendant made a statutory offer. On July 3, the plaintiff rejected it with a counteroffer. At that point, there was no statutory offer pending. On August 2, the defendant rejected the counteroffer and wrote: "I am authorized

to reiterate our previous offer of One-Hundred Thousand Dollars ($100,000) on behalf of the Defendant." This was a new offer, but it was not a statutory offer. An issue for this Court is to construe the terms of the reiterated offer.

2. The August 2 reiteration incorporated by reference the terms of "our previous offer."

In deciding the terms of a settlement, this Court may rely on extrinsic evidence and correspondence between negotiating parties. *McReynolds v. Krebs*, 290 Ga. 850, 853 (2012) ("The circumstances surrounding the making of the contract, such as correspondence and discussions, are relevant in deciding if there was a mutual assent to an agreement, and courts are free to consider such extrinsic evidence."). *See also*, *Paul Dean Corp. v. Kilgore*, 252 Ga. App. 587, 590-91 (2001) **(**noting that "letters prepared by the parties' attorneys may suffice if they memorialize the terms of the agreement"); *Johnson*, 314 Ga. App. at 794 (construing multiple written communications between parties to find enforceable settlement agreement); and *Herring v. Dunning*, 213 Ga. App. 695, 697 (1994) ("letters or documents prepared by attorneys which memorialize the terms of the agreement reached will suffice").

"[A]n offeror is the master of his or her offer, and free to set the terms thereof." *Atkinson v. Cook*, 271 Ga. 57, 58 (1999). In this case, the offeror asked the offeree to look back to a previous offer for the terms of the renewed offer. Counsel for the defendant was "authorized to reiterate our previous offer." That phrase is not complicated and demands only an understanding of the word "reiterate" and the phrase "our previous offer."

Common definitions of "reiterate" include the following: To "say something again or a number of times, typically for emphasis or clarity"[3] and "to state or do over again or repeatedly sometimes with wearying effect."[4] The August 2 letter said something again; it was a "do over." What did the August 2 letter say again or do over? The answer, in the defendant's own words, is "our previous offer." The record in this case includes only one previous offer by the defendant. No one asserts there was another previous offer to confuse what the August 2 reiteration meant by "our previous offer." The sole previous offer was the June 27 offer, and it is there where the terms to the August 2 reiteration are easily found.

[3] http://oxforddictionaries.com/us/definition/american_english/reiterate?q=reiterate

[4] http://www.merriam-webster.com/dictionary/reiterate

The June 27 offer included a wealth of specific terms. Item 2 describes the parties. Item 3 explains the claims to be resolved. Item 4 outlines contingencies relating to the type of release, assurances as to the entitlement of nonparties, and the filing of a dismissal with prejudice. Item 5 provides the amount offered and requires confidentiality. Item 6 allocates punitive damages. Item 7 explains fees and costs. The body of the letter includes other terms, *including the amount of time the offer would remain open*: "This offer shall remain open for thirty (30) days." The June 27 letter went on to recite language from O.C.G.A. § 9-11-68. That portion is irrelevant, as it was not a statutory offer. The statute's irrelevance does not negate, however, the plain recitation of the reiterated terms often found in non-statutory offers.

The offeror chose to "reiterate our previous offer." That phrase must mean something. The defendant who wrote the phrase argues that it means nothing. The defendant argues that its own offer was never capable of acceptance, even before summary judgment was granted. In other words, the defendant asks this Court to not be literal or precise in construing the terms of the August 2 reiteration. Yet, contract law is all about literal construction and precise interpretation. If "reiterate our previous offer" means anything, it means the offeror is making a new offer by

repeating the same terms as the previous one. It would make no sense for the reiteration to include some of the terms plainly stated in the previous offer but not others. Thus, the August 2 reiteration must include the same 30-day time limit for acceptance that was plainly stated in the previous offer of June 27.

As the master of its offer, the defendant was free to refer to the terms of a previous offer and reiterate them. Offers with far less detail than the August 2 reiteration have been ruled capable of acceptance. *See*, *Herring v. Dunning*, 213 Ga. App. 695, 698 (1994) (construing correspondence to include "implied promise" to execute an unidentified type of release). By specifically incorporating the detailed terms for the June 27 offer, the offeror ensured that the terms of the August 2 reiteration were clear, specific and capable of acceptance.

3. The offeree accepted the August 2 reiteration before it expired or was withdrawn.

"If an offer is made by letter, an acceptance by written reply takes effect from the time it is sent." O.C.G.A. § 13-3-3. In this case, the August 2 offer was via letter. The August 23 response accepted the offer without variance of any sort. A valid contract was formed.

"An offer to contract may be withdrawn by the offeror before its acceptance . . . even where the contract provides that it remain open for a stated time." *Greene v. Keener*, 198 Ga. App. 565, 566 (1991). Even though the August 2 reiteration incorporated terms stating it would be open for 30 days, it could have been withdrawn at any time, for any reason of for no reason at all. The offeror never withdrew its offer.

The defendant has asserted that the offer was only open for a reasonable amount of time and that reasonableness is judged by the circumstances. First, that is incorrect as the offer "reiterated" the 30 days for acceptance in the June 27 offer. Second, there is nothing unreasonable about the 30-day period including the date the trial court might decide the pending motion. Offers are often made when motions are pending. Sometimes the offeror specifies a condition that it be accepted before the court rules, and sometimes the offeror does not. In this case, when the defendant reiterated the offer, the defendant knew he had filed a motion, knew the plaintiff had filed a response, knew the motion was ripe for decision and knew the trial court might rule at any moment. Certainly the offeror filed the motion in good faith, had a valid legal basis, and hoped and believed the motion would be granted. From the defendant/offeror's standpoint, it cannot now claim

that it was surprised that its motion was granted or that summary judgment was somehow an unforeseeable event. As the master of the offer, the defendant was free to state, "This offer is automatically withdrawn if the court rules on the pending motion," as GTLA members often see in offers they receive and add in offers they make. The offeror in this case chose otherwise.

Litigants on both sides know that offers to settle are often purposefully crafted to expire on the happening of a future event. Common contingent events written into offers include the start of trial, the date of an expensive expert's deposition, the announcement that the jury has a verdict, the end of a day of mediation, and a ruling on a particular motion. If a party makes an offer at a time one of the events described above is reasonably foreseeable, the party is free to communicate the contingent event. That did not happen in this case. The offer was not contingent on a ruling by the trial court, and this Court should not rewrite the offer to make it so. Articulating contingencies is the responsibility of the offeror, not of this Court.

Any discussion regarding the reasonableness of the time period is a smoke screen for buyer's remorse. In hindsight, the defendant regrets the offer it made and the resulting deal. In matters of settlement, buyer's remorse is not unique.

The defendant would not argue that its offer was incapable of acceptance in other scenarios. For example, if the plaintiff accepted the reiterated offer before the trial court ruled, and the trial court learned of the settlement and did not rule, the defendant would not argue there was no contract. In a different scenario, if the plaintiff accepted, but the trial court did not learn of the settlement and denied the motion, an attempt by the plaintiff to renege would end with the defendant prevailing on a motion to enforce settlement. In either situation, neither the trial court nor this Court would have any problem recognizing the clear terms of the August 2 reiteration. The defendant knew what it was doing when it "reiterate[d] our previous offer," and this Court should enforce the resulting contract.

F. A ruling on a motion for summary judgment does not destroy the object of the contract.

Parties who prevail on motions for summary judgment often settle to avoid a motion for reconsideration, eliminate the risk of reversal on appeal, and achieve finality. Avoiding reconsideration, eliminating the risk of reversal and achieving finality have real value. That value is ample consideration for settlement. The trial judge is not the final arbiter of the existence of a claim. That is particularly true in this case, as the trial court's grant of the motion for summary judgment will be

reviewed *de novo*. This Court will construe all evidence in the light most favorable to the plaintiff. These two principles lead to frequent reversal. A party who avoids the risk that a *de novo* review will result in reversal receives valuable consideration. Arguments that a grant of a motion for summary judgment destroys the consideration contemplated for a settlement agreement are incorrect.

G. The automatic mooting rule invades private parties' freedom to contract.

Georgia holds steadfast to private parties' freedom to contract. *Emory Univ. v. Porubiansky*, 248 Ga. 391, 393 (1981) ("all people who are capable of contracting shall be extended the full freedom of doing so"); *You v. JP Morgan Chase Bank*, S13Q0040, ___Ga. ___ (May 20, 2013) (favoring freedom of contract over consumer protection). Allowing a grant of summary judgment to automatically moot a statutory offer or a common-law offer conflicts with Georgia's longstanding freedom to contract. The freedom to contract includes the freedom to orchestrate the timing of an offer and tempt another party. The freedom to contract includes the freedom to make offers that will not later be blue-penciled by a court. The automatic mooting rule is a form of blue-penciling that interferes with the freedom to contract and that this Court should reject.

IV. CONCLUSION.

The plain language of O.C.G.A. § 9-11-68 does not include an automatic mooting rule, and the trial court erred by writing one in. "Reiteration" means what the dictionary says it means, making the 30-day time limit an express term of the reiterated offer. "The law favors compromise, and when parties have entered into a definite, certain, and unambiguous agreement to settle, it should be enforced." *Johnson*, 314 Ga. App. at 793. The August 2 reiterated offer and its unconditional acceptance are definite, certain and unambiguous. This Court should reverse the trial court and enforce the settlement agreement.

Respectfully submitted June 13, 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 TRIAL 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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