CASE NO: CASE NO: 15-13295

In the

UNITED STATES COURT OF APPEALS

For the

ELEVENTH CIRCUIT

Grange Mutual Casualty Company,

Plaintiff/Appellant,

vs.

Boris Woodard and Susan Woodard,

Defendants/Appellees

Motion for Leave to File *Amicus Curiae* Brief by Georgia Defense Lawyers Association in Support of Plaintiff/Appellant Grange Mutual Casualty Company

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Eleventh Circuit Rule 26.1-1, and Eleventh Circuit Rules 35-5(b) and 35-6, this *amicus curiae* adopts the statement of Appellant / Plaintiff Grange Mutual Casualty Company and adds to it the information pertinent to this *amicus*, as follows:

1. The following persons and entities may have an interest in the outcome of this case:

Allen, Thomas Peter III, Esq.,

Davis, William J., Esq.,

Dolder, Richard E. Jr., Esq.,

Drew Eckl & Farnham, LLP,

Georgia Defense Lawyers Association,

Grange America Corporation,*

Grange Indemnity Insurance Company,

Grange Insurance Company of Michigan,

Grange Life Insurance Company,*

Grange Life Reinsurance Company,*

Grange Mutual Casualty Company,

Grange Property & Casualty Insurance Company,

Integrity Mutual Insurance Company,*

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Martin Snow, LLP,

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Michael Lawson Neff, P. C.,

Neff, Michael L., Esq.,

Northview Insurance Agency,*

Peagler, T. Shane, Esq.,

Sadd, James (Jay), Esq.,

Slappey & Sadd, LLC,

Story, Honorable Richard W.,

Trustgard Insurance Company,

Woodard, Boris, and

Woodard, Susan.

As a mutual company, Grange Mutual Casualty Company has no stock, and there is therefore not a publically held corporation owning 10% or more of that company.

* For the sake of completeness, these subsidiaries/affiliates are being added to those entities named in Appellant's initial corporate Disclosure Statement. No persons or entities have been deleted.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Pursuant to Fed. R. App. P. 29(b), and Eleventh Circuit Local Rules 29-1, 35-6, and 40-6, the Georgia Defense Lawyers Association ("GDLA"), by and through its attorneys, respectfully requests leave of this Honorable Court to act as *amicus curiae* in this matter, and to file its brief as *amicus curiae* in support of the Plaintiff/Appellant Grange Mutual Casualty Company. A copy of the proposed *amicus* brief is attached hereto. *Amicus* further states:

1. The Georgia Defense Lawyers Association ("GDLA") has more than 825 members, ranging from sole practitioners to lawyers in large firms. Though its members are diverse, they share a common interest in supporting and improving the civil defense bar, improving the adversary system of jurisprudence, eliminating delay in litigation, and otherwise improving the administration of justice.

2. Because many of GDLA's members represent insurance carriers and self-insured corporations, which routinely receive and respond to policy limit time demands, GDLA's members have a vested interest in the interpretation and application of O.C.G.A. § 9-11-67.1. Further, since this statute was recently enacted, there is an absence of case law interpreting the provisions contained therein. As such, GDLA believes that decisions interpreting this statute are of exceptional importance. Accordingly, GDLA wishes to submit the attached brief

which addresses the legislative intent underlying the enactment of the statute and which explains why the district court erred in its interpretation of the provisions contained in the statute.

3. As an additional policy concern, the *amicus* brief is designed to show the Court that the district court's decision, while not binding precedent, may encourage frivolous litigation.

4. Pursuant to Eleventh Circuit Local Rule 40-6, the proposed brief of *amicus curiae* is attached to this filing.

For the foregoing reasons, the GDLA respectfully requests that the Court grant *amicus* leave to file the attached *amicus curiae* brief in support of the Plaintiff/Appellant Grange Mutual Casualty Company.

Respectfully submitted, this 15th day of September, 2015.

DREW ECKL & FARNHAM, LLP

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CERTIFICATE OF COMPLIANCE

I certify that the attached *amicus* brief complies with the length requirements of Fed. R. App. P. 35 and Eleventh Circuit Rule 35–6. The proposed *amicus* brief does not exceed 15 pages, exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), and (j). It also complies with typeface requirements, and has been prepared in Times New Roman 14-point font.

By: /s/ Garret W. Meader
GARRET W. MEADER
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CERTIFICATE OF SERVICE

I certify that on the 15th day of September, 2015, I electronically filed a copy of the foregoing Motion for Leave to File Amicus Curiae Brief by Georgia Defense Lawyers Association in Support of Petition for Rehearing En Banc with the Clerk of Court and mailed and emailed copies of such filing to the following attorneys of record:

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***Amicus Curiae* Brief of the Georgia Defense Lawyers Association ("GDLA") in Support of Plaintiff/Appellant Grange Mutual Casualty Company**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Eleventh Circuit Rule 26.1-1, and Eleventh Circuit Rules 35-5(b) and 35-6, this *amicus curiae* adopts the statement of Appellant / Plaintiff Grange Mutual Casualty Company and adds to it the information pertinent to this *amicus*, as follows:

1. The following persons and entities may have an interest in the outcome of this case:

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* For the sake of completeness, these subsidiaries/affiliates are being added to those entities named in Appellant's initial corporate Disclosure Statement. No persons or entities have been deleted.

STATEMENT OF COUNSEL PURSUANT TO F.R.A.P. 29(c)(5) and ELEVENTH CIRCUIT RULES 35-5 AND 35-6

Counsel for the GDLA hereby expresses a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance: (1) whether the Georgia General Assembly intended for O.C.G.A. § 9-11-67.1 to permit claimants to condition acceptance of offers to settle policy limit time demands on the performance of a specific act; and (2) whether the district court erred in determining that no settlement was reached although Grange Mutual Casualty Company made a check payable to the Woodards within the requested 10 day period. The GDLA respectfully submits that the district court decided these issues incorrectly.

The GDLA states that (A) no party's counsel authored this *amicus* brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

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STATEMENT OF THE ISSUES

There are two issues presented in this case: (1) whether the Georgia General Assembly intended for O.C.G.A. § 9-11-67.1(c) to permit claimants to condition acceptance of offers to settle policy limit time demands on the performance of a specific act thereby nullifying the explicit written acceptance provisions contained in subpart (b) of the statute; and (2) whether the district court erred in determining that no settlement was reached although Grange Mutual Casualty Company made a check payable to the Woodards within the requested 10 day period.[1]

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The Georgia Defense Lawyers Association ("GDLA") has more than 825 members, ranging from sole practitioners to lawyers in large firms. Though its members are diverse, they share a common interest in supporting and improving the civil defense bar, improving the adversary system of jurisprudence, eliminating delay in litigation, and otherwise improving the administration of justice.

The GDLA respectfully submits this *amicus curiae* brief because this appeal presents important issues regarding the effect of O.C.G.A. § 9-11-67.1 on the

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[1] As an initial matter, GDLA notes that because the issues presented in this case are solely questions of Georgia state law upon which Georgia courts seem to have not provided any clear answers, the questions presented in this appeal may be ideal candidates for certification to the Georgia Supreme Court. *Cascade Crossing II, LLC v. Radioshack Corp.*, 480 F.3d 1228, 1229 (11th Cir.) (setting forth criteria considered when certifying questions) certified question answered, 282 Ga. 841, 653 S.E.2d 680 (2007).

settlement of policy limit time demands. Because many of GDLA's members represent insurance carriers and self-insured corporations, which routinely receive and respond to policy limit time demands, GDLA's members have a vested interest in the interpretation and application of O.C.G.A. § 9-11-67.1. Further, since this statute was recently enacted, there is an absence of case law interpreting the provisions contained therein. As such, GDLA believes that decisions interpreting this statute are of exceptional importance.

It is the position of the GDLA that the district court's interpretation of certain provisions contained in this statute negates the very reason the statute was enacted –to provide claimants and insurance carriers with a clear roadmap for the resolution of bodily injury claims prior to the filing of a civil action. For the reasons set forth below, the district court's decision should be reversed.

ARGUMENT AND CITATION OF AUTHORITIES

I. The District Court Incorrectly Found that O.C.G.A. § 9-11-67.1 Does Not Place Restrictions on the Making of Policy Limit Time Demands.

The use of policy limit time demands has generated significant litigation since the seminal case of *Southern General v. Holt* was decided by the Georgia Supreme Court in 1992. *Southern General v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992); *McReynolds v. Krebs*, 290 Ga. 850, 725 S.E.2d 584 (2012) (whether a request for information concerning claimant's liens constituted a counteroffer);

Torres v. Elkin, 317 Ga. App. 135, 730 S.E.2d 518 (2012) (whether inquiry related to disposition of liens constituted counteroffer); *Southern General Ins. Co. v. Wellstar Health Systems, Inc.*, 315 Ga. App. 26, 726 S.E.2d 488 (2012) (whether insurance company's common law and statutory duties were reconcilable); *Baker v. Huff*, 323 Ga. App. 357, 747 S.E.2d 1 (2013) (whether offer to settle less than all claims constituted a *Holt* demand); *Kitchens v. Ezell*, 315 Ga. App. 444, 726 S.E.2d 461 (2012) (whether a disagreement over wording used in a release was fatal to formation of settlement agreement). Perhaps in recognition of the frequency with which issues arising from *Holt* demands are litigated, and the uncertainty facing claimants and insurers when making and responding to *Holt* demands , the Georgia General Assembly enacted O.C.G.A. § 9-11-67.1, which became effective July 1, 2013. This statute serves as a roadmap for making and responding to policy limit time demands sent in connection with claims for bodily injuries sustained as the result of motor vehicle accidents.

This statute provides, in relevant part, as follows:

"(a) Prior to the filing of a civil action, any offer to settle a tort claim for personal injury, bodily injury, or 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 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.

(c) Nothing in this Code section is intended to prohibit parties from reaching a settlement agreement in a manner and under terms otherwise agreeable to the parties.

[...]

(g) Nothing in this Code section shall prohibit a party making an offer to settle from requiring payment within a specified period; provided, however, that such period shall be not less than ten days after the written acceptance of the offer to settle."

In order to preempt disputes concerning whether a claimant has included the terms which are essential to a valid policy limit time demand, O.C.G.A. § 9-11-67.1 sets forth five material terms which must be addressed in the written demand: (1) a time period for acceptance of no less than 30 days; (2) the amount of the payment; (3) the parties released; (4) the type of release; and (5) the claims released. O.C.G.A. § 9-11-67.1(a). Subpart (b) of the statute removes any ambiguity as to how a policy limit time demand can be accepted. The legislature crafted this subpart to require that acceptance is to be made in a writing which specifically affirms that all five material terms have been accepted in their entirety. Thus, when read together, subparts (a) and (b) of O.C.G.A. § 9-11-67.1set the parameters for making and accepting policy limit time demands.

Here, it is undisputed that the Woodards relied upon and invoked O.C.G.A. § 9-11-67.1 when they made their offer.[2] It is further undisputed that their offer complied with the statute inasmuch as it contained the five required material terms contained in O.C.G.A. § 9-11-67.1(a). It is likewise not in dispute that Grange accepted these material terms in writing, and in their entirety, as required by O.C.G.A. § 9-11-67.1(b). (Doc. 15-2, par. 20; Doc. 29-3, par. 7).

[2] The demand letter sent by the Woodards' counsel contains the heading "Offer to Settle Tort Claims Made Pursuant to O.C.G.A. § 9-11-67.1 [...]" and reference is made to the statute an additional four times in the body of the letter. (Doc. 1-2; Doc. 29-3).

The crux of the dispute in this case is whether the Woodards' could require Grange to express its acceptance of the five material terms in writing and also require Grange to perform additional acts as conditions of acceptance – i.e. making payment payable within 10 days of the written acceptance of the Woodards' offer. (Doc. 39, p. 7). Although the statute expressly sets forth the manner for making and accepting offers, the district court nonetheless concluded that the Woodards were entitled to unilaterally impose their own conditions of acceptance.

In reaching its conclusion, the district court cited to O.C.G.A. § 9-11-67.1(c), which provides: "Nothing in this Code section is intended to prohibit parties from reaching a settlement agreement in a manner and under terms otherwise agreeable to the parties." [emphasis applied]. The district court further reasoned that because an offeror is the master of his or her offer, the offeror is therefore free to set the terms thereof. (Doc. 39, p. 7). The district court erred in its interpretation and application of sub-part (c).

Rather than interpreting sub-part (c) to permit parties from reaching settlement agreements on terms otherwise agreeable to the parties, the district court interpreted sub-part (c) to mean claimants may make offers to resolve their claims (as opposed to parties agreeing to different material terms) which do not conform to the offer and acceptance provisions contained in O.C.G.A. § 9-11-67.1. By its

express terms, sub-part (c) only permits parties to resolve their claims in a way that differs from the requirements contained in O.C.G.A. § 9-11-67.1 to the extent that a party makes a nonconforming offer and the other party accepts the offer. Because the Woodards claim their offer was rejected by Grange's failure to perform a condition of acceptance, subpart (c) offers the Woodards no support for their claim that they were free to make an offer to resolve their claims on their own terms. (Doc. 34, p, 6).

In essence, the district court concluded that sub-part (c) grants a claimant an unfettered right to set the terms of its offer – regardless of the provisions contained in subparts (a) and (b).[3] Under this interpretation of the statute, a claimant may now shorten the time to respond to an offer, impose unrealistic conditions of payment, or place limitations on efforts by a responding party to seek clarification regarding relevant facts. Simply stated, the district court's interpretation O.C.G.A. § 9-11-67.1(c) completely eviscerates the purpose of the statute by allowing claimants to unilaterally alter the material terms and the method of acceptance.

[3] A reasonable interpretation of sub-part (c) is that it simply serves as a safety-valve in order to permit claimants and insurers, or other parties, to resolve pre-suit claims when all parties, not just claimants, wish to include terms that differ from, or expound upon, the material terms outlined in sub-part (a) without violating the statute. Stated another way, parties can reach a settlement that contains material terms which differ from those in subpart (a), but a claimant cannot make a demand which is inconsistent with subparts (a) and (b) (i.e. conditioning acceptance upon performance) and then argue that its demand was rejected.

Such an interpretation of the statute does not give proper weight to the legislature's intent in enacting the statute.

When resolving questions of legislative intent, the following rules of construction apply:

> "The cardinal rule of statutory construction is to seek the intent of the Legislature, and language in one part of a statute must be construed 'in the light of the legislative intent as found in the statute as a whole.' *Goldberg v. State*, 282 Ga. 542, 544, 651 S.E.2d 667 (2007) (citation and punctuation omitted). In determining the Legislature's intent, we must first focus on the statute's text. *Busch v. State*, 271 Ga. 591, 592, 523 S.E.2d 21 (1999). 'In order to discern the meaning of the words of a statute, [we] must look at the context in which the statute was written, remembering at all times that 'the meaning of a sentence may be more than that of the separate words....' [Cit.]' *Id.* In addition, [in] interpreting a statute, we must presume that the General Assembly had full knowledge of the existing state of the law and enacted the statute with reference to it. We construe statutes 'in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence,' and 'their meaning and effect is to be determined in connection, not only with the common law and the

constitution, but also with reference to other statutes and decisions of the courts.'

Fair v. State, 288 Ga. 244, 252, 702 S.E.2d 420, 428 (2010).

Presumably, the legislature enacted this statute to address the panoply of litigation surrounding the use of *Holt* demands. Interpreting the statute in a way which renders it meaningless and creates a cloud of uncertainty around the rights of the parties that the statute was intended to help does not comport with the rule of construction that the General Assembly had a full knowledge of the existing law and enacted the statute with reference to it. Moreover, had the legislature intended for sub-part (c) to bestow upon claimants the right to unilaterally alter the statute's offer and acceptance requirements, the legislature could have easily drafted sub-part (c) to read: "Nothing in this Code section is intended to prohibit claimants from making offers in a manner and under terms inconsistent with this code section." Instead, the legislature limited (c) to situations in which all parties, not just claimants, consent to terms that are otherwise agreeable. Grange accepted the Woodards' demand as required by the statute when it affirmed, in writing, that it assented to the five material terms contained in the offer. Because subparts (a) and

(b) were satisfied, a settlement was reached and the district court erred when it found otherwise.[4]

II. Notwithstanding O.C.G.A. § 9-11-67.1, Grange Properly Accepted the Woodards' Demand and Timely Made Payment Payable to Them.

The Woodards' demand plainly called for acceptance in writing. In fact, the second paragraph in their letter provides: "Your acceptance of this offer may be made in writing to me at the above address shown in my letterhead. If we do not receive a timely acceptance, this offer will be deemed rejected, and we will file a lawsuit against your insureds." (Doc. 1-2; Doc. 29-3, pars. 5, 8). Although the offer clearly calls for written acceptance, the Woodards argue that their demand letter also conditions acceptance on the payment of settlement proceeds and that Grange rejected their demand by failing to timely meet this condition. The Woodards' position is untenable for two reasons.

First, the Woodards appear to claim that their inclusion of the phrase "[t]imely payment is an essential element of acceptance" in their demand supersedes the language contained in the second paragraph of their demand which unequivocally states that acceptance may be made in writing. The demand offers

[4] Subpart (g) of the statute permits a claimant to require payment within ten days of acceptance. Subpart (g) does not require payment as a condition of acceptance. Rather, payment is a condition of performance. Thus, subpart (g) further supports the argument that had the legislature intended for claimants to be able to require performance as a condition of acceptance it would have drafted the statute to include such a provision.

no additional explanation as to which form of acceptance the Woodards intended to require. It is axiomatic that ambiguities in writings are to be construed most strongly against the drafter for whose benefit the writing was prepared. *Parham v. Peterson, Goldman & Villani*, 296 Ga. App. 527, 530, 675 S.E.2d 275, 277 (2009). Because the writing at issue was prepared by the Woodards, any ambiguity surrounding acceptance of their offer must be resolved in Grange's favor. The district court erred by finding otherwise.

Second, assuming the demand can be interpreted to condition acceptance upon performance, Grange properly performed. Paragraphs 4 and 5 of the demand provide, in relevant part: "If payment is not tendered in cash [...] payment in the amount of $50,000 <u>must be made payable</u> to 'Boris and Susan Woodard and Michael J. Neff, their attorney for the wrongful death of their daughter, Anna Woodard' within ten (10) days after your written acceptance of this offer to settle." (Doc. 1-2, p. 4 par. 4). "If payment is not tendered in cash [...] payment in the amount of $50,000 <u>must be made payable</u> to 'Boris Woodard and Michael J. Neff, his attorney' within ten (10) days after your written acceptance of this offer." (Doc. 1-2, p. 4 par. 5). In conformity with the demand, Grange issued a check within the 10 day period. However, the check was not received by the Woodards' counsel.

While the district court correctly recognized that making payment and writing checks in a timely matter are distinct concepts, it nonetheless found that, although the demand plainly calls for making checks payable within 10 days, the demand was ambiguous. Compounding its error, the district court found that the ambiguity should be resolved in favor of the Woodards - instead of applying the well-settled rule that ambiguities are to be resolved against the drafter.

Furthermore, the district court ignored other sections of the demand which called for acceptance by performance. In that regard, the demand specified that certain affidavits "must be received in [Woodards' counsel's] office" within 10 days of written acceptance. (Doc. 1-2, p. 3, pars. 2, 3). Had the Woodards intended to condition acceptance on their actual receipt of the checks within ten days, they would have included the same language that had been used for the affidavits. The fact that this language was omitted from their letter served to make their demand more ambiguous and should have tilted the scales even further in favor of Grange. However, the district court appears to have overlooked these ambiguities and instead found that Grange rejected the offer. Because there was an enforceable settlement agreement between the Woodards and Grange, the district court's decision should be reversed.

CONCLUSION

The Georgia General Assembly is presumed to have intended exactly what it said when it adopted O.C.G.A. § 9-11-67.1, which makes clear that an offer to settle the type of claim at issue in this case can only be accomplished by following subparts (a) and (b) of the statute, unless both parties agree to different terms as provided for by subpart (c). If there is concern that the statute means something other than what it says, the Georgia Supreme Court should hear the matter. Notwithstanding O.C.G.A. § 9-11-67.1, Grange properly accepted the Woodards' demand and timely issued payment to them. The district court's decision should be reversed.

This 15th day of September, 2015.

DREW ECKL & FARNHAM, LLP

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CERTIFICATE OF SERVICE

I certify that on September 15, 2015, I electronically filed a copy of this Brief in Support of Petition for Rehearing En Banc and mailed and emailed copies of such filing to the following attorneys of record:

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This 15th day September, 2015.

DREW ECKL & FARNHAM, LLP

By: /s/ Garret W. Meader
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