IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S18G0517

FIRST ACCEPTANCE INSURANCE COMPANY OF GEORGIA, INC.,

Appellant,

v.

ROBERT W. HUGHES, JR., as Administrator
of the Estate of Ronald Nathanial Jackson

Appellee.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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I. STATEMENT OF INTEREST

The Georgia Defense Lawyers Association ("GDLA") is an association of approximately 900 Georgia lawyers, including sole practitioners and lawyers in law firms of all sizes, who engage in litigation, primarily for defendants in civil litigation, and represent insurance companies, individuals, and self-insured corporations. 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 improving the administration of justice.

The GDLA and its members are interested in ensuring that basic principles of insurance law, contract law, and tort law are clearly defined and uniformly applied. It is axiomatic that legal systems are intended to provide a level of certainty and predictability so that individuals and businesses can shape their conduct appropriately.

Ensuring predictability, fairness, and reasonableness in the making of settlement demands and the imposition of extra-contractual liability on insurers is of key importance to all persons and companies involved in litigation of civil matters in Georgia courts. Almost 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 submits this amicus brief out of concern that the opinion below converts legal issues, which under well-established Georgia law must be decided by the court as questions of law, into questions of fact to be decided by the jury. Because the GDLA's members regularly represent defendants and insurance companies in civil litigation (and regularly advise both insureds and insurers regarding settlement of liability claims), the GDLA has a vested interest in having this Court correct the significant legal errors in the Court of Appeals' decision.

The GDLA respectfully submits that requiring liability insurers to affirmatively initiate settlement negotiations whenever the insurer "knows or reasonably should know that settlement within the insured's policy limits is possible with an injured party" is not a proper application of existing Georgia law. Furthermore, the GDLA believes that imposing such a duty would lead to several unintended consequences. For example, such a rule will inevitably lead to court congestion and increased litigation costs, as juries will be required to determine when the insurer knew or reasonably should have known that settlement within policy limits was possible. Similarly, such a rule will result in far less certainty in the law because injured parties will be able to testify after-the-fact that they would have accepted an offer within policy limits at a particular time had the insurer just made an offer. Such *ex post facto* testimony inherently will be suspect and unreliable.

The GDLA believes the public policy of this state of encouraging settlement of disputes is important and should be furthered. Requiring an injured party to present a valid offer to settle within the insured's policy limits to trigger an insurer's duty to settle furthers that public policy. Specifically, such a rule will ensure that settlement demands are made in a good-faith effort to truly resolve disputes, and not as a way to attempt to "set up" liability insurers for excess exposure.

II. SUMMARY OF ARGUMENT

In its Order granting certiorari, this Court raised concern with the following issues:

1. Did the Court of Appeals err in reversing the grant of summary judgment to the insurer on the insured's failure-to-settle claim, on the basis that questions of fact existed for the jury to determine as to whether the injured party offered to settle her claims within the policy limits, and established a 30-day deadline to accept the offer?

2. Does an insurer's duty to settle arise when it knows or reasonably should know settlement within the insured's policy limits is possible with an injured party or only when the injured party presents a valid offer to settle within the insured's policy limits?

As explained below, the answer to the Court's first question is simply "yes." Interpretation, or construction, of a settlement offer presents a question of law, and this Court has previously held that the Court of Appeals commits reversible error

by not following the three-step process for interpreting legal documents, like a settlement offer.

And, the answer to the Court's second question must be that the insurer's duty only arises upon receipt of an unambiguous offer to settle within the insured's policy limits. For that reason, the Court of Appeals erred in reversing summary judgment for First Acceptance.

III. ARGUMENT AND CITATION OF AUTHORITY

A. The Court of Appeals Erred in Reversing the Grant of Summary Judgment to First Acceptance on Appellee's Failure-to-Settle Claim, Because No Question of Fact Exists as to Whether the Injured Party Made an Offer to Settle her Claims that Could Have Been Accepted by First Acceptance

Without question, the answer to the first issue raised in the Court's Order granting certiorari is that the Court of Appeals erred in reversing the trial court's entry of summary judgment in favor of the insurer here. Interpretation, or construction, of the June 2, 2009 letters, which Appellee contends include a time-limited settlement offer, is a question of law. Indeed, Appellee appears to even concede as much:

> If, however, the Court of Appeals' statement is to be taken literally, then Appellee agrees that the Court of Appeals erred by characterizing the issue as one of fact, because the issue of whether the written correspondence was a legal "offer" which would grant an accepting party the right to enforce it as a contract is an issue of law.
>
> . . . .

> Appellee surmises that the Court of Appeals intended to communicate that there remained genuine issues of fact regarding whether the June 2, 2009 correspondence presented First Acceptance with an "adequate opportunity" to settle the claim within the policy limits. . . . . If, however, the above-quoted statement from the Court of Appeals is to be taken literally, then Appellee agrees with First Acceptance that the issues of whether the June 2, 2009 correspondence made an "offer" and interpretation of the offer's terms present legal questions.

(Appellee's Br. at 13-14, 31-32).[1] Those admissions, which are binding on, and may be used against Appellee, e.g., Bates Guar. Nat'l Ins. Co., 223 Ga. App. 11, 14 n.1 (1996), are sufficient for this Court to reverse the Court of Appeals' decision.

1. Interpretation, or Construction, of the June 2 Letters is a Question of Law

Under Georgia law, interpretation of a settlement offer presents a question of law for a court. E.g., H&E Innovation, LLC v. Shinhan Bank Am., Inc., 343 Ga. App. 881, 881-82 (2017), *cert. denied*, No. S18C0565, 2018 Ga. LEXIS 418 (Ga. June 4, 2018); Graham v. HHC St. Simons, Inc., 322 Ga. App. 693, 694-95 (2013); accord Grange Mut. Cas. Co. v. Woodard, 861 F.3d 1224, 1230-31 (11th Cir. 2017). In Woodard, after this Court answered certified questions regarding interpretation of O.C.G.A. § 9-11-67.1, the Eleventh Circuit addressed the remaining issue of interpreting settlement offer letters. 861 F.3d at 1230 (noting, court "must still resolve whether the terms of the [tort claimants'] June 19 offer

[1] GDLA notes that its citation to pages from briefs refer to the page number stamped at the top of briefs by the Court's e-filing system.

letter made timely payment a precondition of acceptance"). The Eleventh Circuit explained the applicable law as follows:

> We review the district court's interpretation of a contract de novo. Under Georgia law, there are three steps in the process of contract construction. The court must first decide whether the contract language in the [settlement] offer letter is ambiguous; if it is ambiguous, the court must then utilize the applicable rules of construction; if an ambiguity still remains, a jury must then resolve the ambiguity. "Whether a contract is ambiguous is a question of law for the courts to decide."

Id. at 1230-31 (citations omitted).

This is the same three-step process this Court has set forth for the interpretation of any contract. See, e.g., Atlanta Dev. Auth. v. Clark Atlanta Univ., Inc., 298 Ga. 575, 579 (2016); Borders v. City of Atlanta, 298 Ga. 188, 196 (2015); Travelers Ins. Co. v. Blakey, 255 Ga. 699, 699-700 (1986). As this Court has made clear, "[w]here 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.'" MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 588, 562 (2011). See also Blakey, 255 Ga. at 700 (reiterating same rule "[e]xcept in cases where the meaning of obscurely written words is involved").

Here, the Court of Appeals did not follow any of the required steps to interpret the June 2, 2009 letters. Instead, the court simply concluded,

> It is apparent from a review of those letters that they, at the very least, create genuine issues of material fact as to whether Hong offered to settle her claims within the insured's policy limits and to release the insured from further liability, and whether the offer included a 30-day deadline for a response.

Hughes v. First Acceptance Ins. Co. of Ga., Inc., 343 Ga. App. 693, 697 (2017). Indeed, the Court of Appeals did not even attempt to interpret the June 2, 2009 letters. It did not determine whether the language in the letters was ambiguous. And, it did not utilize any of the applicable rules of construction.

This Court has previously held that the Court of Appeals committed reversible error when it failed to follow the required three-step process for construing a contract. See Blakey, 255 Ga. at 699-700. Blakey involved a dispute about certain language in a medical insurance contract, and the trial court submitted construction of the disputed language to the jury. After the Court of Appeals affirmed, holding that the language was ambiguous and accordingly was within the province of the jury to construe, this Court vacated the Court of Appeals' decision and remanded because the Court of Appeals did not acknowledge "the principle that even ambiguous contracts are to be construed by the court unless an ambiguity remains after application of the applicable rules of construction." Id. at 700.

Because the Court of Appeals did not follow any of the steps necessary in construing a settlement offer, the conclusion of the court below that a jury must

resolve whether the letters offered to settle claims and whether the letters included a 30-day deadline for the response constitutes reversible error.

2. The June 2 Letters Did Not Trigger a Duty to Settle

While this Court could simply reverse the Court of Appeals' decision and remand with instructions to follow the proper process and apply the rules of contract construction, it is both proper and judicially efficient for this Court to construe the June 2, 2009 letters itself, since interpretation of a settlement offer (like any offer to contract) is a question of law for this Court to review *de novo*. E.g., H&E Innovation, 343 Ga. App. at 881-82. See also City of Gainesville v. Dodd, 275 Ga. 834, 838 (2002) (explaining that judicial economy is advanced in summary judgment cases, where the factual record is set and the appellate courts can apply those facts to the law: "[w]hen [this Court] recognizes that the [Court of Appeals'] legal analysis was flawed, the efficiency of the judicial system as a whole is advanced when [this Court] examines the record and applies the law to any unaddressed ground that will resolve the case").

Employing the three-step process for construction of the June 2, 2009 letters demonstrates that the trial court's grant of summary judgment to First Acceptance was correct. To that end, there is no reasonable interpretation of the June 2 letters that indicates that First Acceptance needed to respond within a particular amount of time or risk an excess judgment against its insured. See, e.g., Cotton States Mut.

Ins. Co. v. Brightman, 276 Ga. 683, 685 (2003) (noting that an insurer may be liable for "failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an unreasonable risk"); S. Gen. Ins. Co. v. Holt, 262 Ga. 267, 269 (1992) (explaining that issue is "whether the insurer acted unreasonably in declining to accept a time-limited settlement demand").

In the case below, as the Court of Appeals noted, the multi-vehicle accident caused by First Acceptance's insured occurred on August 29, 2008. Hughes, 343 Ga. App. at 693. "On September 10, 2008, counsel for An and Hong contacted First Acceptance and stated, in part, that he looked forward to working with the insurer to resolve the matter and that he would forward a settlement demand when his clients had finished treatment for their injuries." Id. at 694. First Acceptance's counsel then sent two letters to counsel for all of the injured claimants, including Hong and An, seeking to schedule a settlement conference with all parties; the first letter was dated January 15, 2009 and the second dated February 2, 2009. Id.

Counsel for Hong and An finally responded to the letters on June 2, 2009 with a six-page fax. (R-1295-1301.) The first page of the fax was a fax cover page. (R-1296.) The next two pages were a letter from the attorney dated June 2, 2009. (R-1297-98.) The fourth page was a copy of the declaration page for Hong and An's uninsured motorist ("UM") insurance policy. (R-1299.) The final two pages of the fax was another letter from the attorney, also dated June 2, 2009. (R-

1300-01.) According to the first two-page letter, the last two-page letter was a "letter of representation and insurance information request for [First Acceptance's counsel's] use." (R-1297.)

The first two-page letter within the fax opened by acknowledging receipt of the January 15, 2009 letter from First Acceptance's counsel expressing First Acceptance's "interest in arranging a settlement conference/mediation in this matter" and stated that Hong and An were "interested in having their claims resolved within [First Acceptance's] insured's policy limits, and in attending a settlement conference if [First Acceptance's] counsel th[ought] it would be helpful." (R-1297.) After noting that a letter of representation and request for insurance information was attached for use by First Acceptance's counsel, the letter continued, "If you are still thinking a settlement conference would be helpful to settling these claims, we are happy to attend. If you will please send me some dates that would work for everyone to meet, I will check my calendar and with clients for dates when we are available." (Id.) The letter suggested a potential location, and even offered to take care of reserving space for the global settlement conference based on where most of the involved parties were located and to provide a list of suggested mediators. (Id.) The letter also stated, "[i]n advance, if you and your client want to obtain medical documentation of my clients' injuries, I

will send you authorizations for the release of their medical records along with a list of their medical providers." (Id.)

After mentioning his clients' UM insurance limits, the letter explained,

> Of course, the exact amount of UM benefits available to my clients depends upon the amount paid to them from the available liability coverage. Once that is determined, a release of your insured from all personal liability except to the extent other insurance coverage is available will be necessary in order to preserve my clients' rights to recover under the UM coverage and any other insurance policies. In fact, if you would rather settle within your insured's policy limits now, you can do that by providing that release document with all the insurance information as requested in the attached, along with your insured's available bodily injury liability insurance proceeds.

(R-1297-98.)

As stated, the next page of the six-page June 2, 2009 fax was a copy of the declarations page from Hong and An's UM insurance policy. (R-1299.) Following the declarations page was another two-page letter from the attorney for Hong and An. (R-1300-01.) As the first two-page letter indicated, the second two-page letter included with the June 2 fax opened by indicating that Hong and An were represented by the attorney. (R-1300.) The letter than requested various insurance information be provided "within thirty days of the date of this letter." (Id.) The letter also noted that "[a]ny settlement will be conditioned upon [counsel's] receipt of all the requested insurance information." (Id.)

Here, there is no reasonable interpretation of the June 2 letters that indicates that not responding within a particular amount of time would potentially risk an

excess judgment against the insured. The first June 2 letter, which arguably includes an offer to settle buried within a paragraph discussing Hong and An's UM insurance, contains no time limit whatsoever and the majority of the letter clearly indicates that Hong and An were willing and interested in participating in a global settlement conference. (See R-1297-98.) The only basis for Appellee's contention that there was a 30-day time limit is the reference in the first letter to the second letter, which requested that certain insurance information be provided "within thirty days of the date of this letter."

Under the statutory rules of interpretation, "[t]ime is not generally of the essence; but, by express stipulation or reasonable construction, it may become so." O.C.G.A. § 13-2-2(9). However, there is no reasonable construction that indicates that First Acceptance was required to respond to the purported "offer to settle" within 30 days. Rather, the most reasonable interpretation is that First Acceptance was required to provide the requested insurance information within 30 days, but that there was not a time-limit on settling the claims of Hong and An.[2] Further, to the extent it is unclear whether the purported "offer to settle" contained a time-

[2] GDLA questions whether First Acceptance was even required to provide the requested insurance information within 30 days. The second June 2, 2009 letter, requesting insurance information be provided within 30 days, mirrored the provisions of O.C.G.A. § 33-3-28 (which sets a 60-day deadline for providing the same information requested in the letter), but did not comply with the statute's requirements that the request "set forth under oath the specific nature of the claim asserted and shall be mailed to the insurer by certified or statutory overnight delivery." O.C.G.A. § 33-3-28(a)(1). (R-1300-01.)

limit of 30-days, another statutory rule of interpretation requires that uncertainty to be construed "most strongly against" counsel for Hong and An, as the drafter. O.C.G.A. § 13-2-2(5).

In addition, Georgia law recognizes that "[i]f an offer contains alternative propositions, the party receiving the offer may elect between the alternative propositions." O.C.G.A. § 13-3-3. Here, the first June 2, 2009 letter, which includes the arguable offer to settle, contains alternative propositions. Specifically, the vast majority of the letter discusses First Acceptance's proposed global settlement conference and repeatedly indicates that Hong and An were interested in attending the global settlement conference. (R-1297.) The letter also indicates, albeit buried in a paragraph regarding UM insurance, that "if [First Acceptance] would rather settle within [its] insured's policy limits now, [it] can do that providing that release document with all the insurance information as requested in the attached, along with [its] insured's available bodily injury liability insurance proceeds." (R-1298.) Because the first June 2, 2009 letter includes alternative propositions regarding possible settlement (global conference or settle now), First Acceptance, as the party receiving the offer, had the option to elect between the

two. O.C.G.A. § 13-3-3. And, its selection of that option cannot be the basis of tortious failure to settle liability.[3]

Thus, under Georgia statutory law, there is no reasonable construction of the June 2, 2009 letters that would put a reasonably prudent insurer on notice that it must respond within a particular amount of time or risk an excess judgment against its insured. See, e.g., Mesa v. Clarendon Nat'l Ins. Co., 799 F.3d 1353, 1357, 1360 (11th Cir. 2015) (affirming summary judgment for insurer on failure to settle claim under Florida law, and noting that one of the claimants never communicated to insurer an unwillingness to participate in a global settlement so insurer "had good reason to believe that all four claimants were working towards a global settlement"); Valle v. State Farm Mut. Auto. Ins. Co., 394 F. App'x 555, 556-57 (11th Cir. 2010) (affirming summary judgment for insurer on failure to settle claim under Florida law, and noting that one claimant never gave an indication that "extraordinarily prompt resolution was requested" and her conduct indicated that she was going to participate in a global settlement with other claimants). Accordingly, the Court of Appeals erred in reversing the grant of summary judgment to First Acceptance on Appellee's failure-to-settle claim, on the basis

[3] GDLA notes that the trial court's order granting First Acceptance summary judgment explicitly noted that the June 2 Letters included alternative propositions. (See R-794) (noting that counsel for Hong and An "appears to have given Defendant the option to proceed with a settlement conference involving the five claimants, or alternatively to tender Mr. Jackson's policy limits to the Hong and An claimants, but without setting a deadline in either event").

that questions of fact existed for the jury to determine as to whether Hong and An offered to settle their claims within policy limits and established a 30-day deadline to accept the offer.

B. An Insurer's Duty to Settle Arises Only When the Injured Party Presents an Offer to Settle Within the Insured's Policy Limits

The answer to the second issue raised in the Court's Order granting certiorari – "Does an insurer's duty to settle arise when it knows or reasonably should know settlement within the insured's policy limits is possible with an injured party or only when the injured party presents a valid offer to settle within the insured's policy limits?" – is that the duty only arises upon receipt of an offer to settle within the insured's policy limits.[4] This is true both because there is

[4] GDLA notes its agreement with other *amici* that this Court could or should consider the proper standard of liability for failure to settle claims if it is going to consider an insurer's legal duty for such claims. GDLA submitted an amicus brief to the Eleventh Circuit Court of Appeals in Camacho v. Nationwide Mutual Insurance Co., 692 F. App'x 985 (11th Cir. 2017) on the issue of the proper standard of liability and, as set forth in that brief, a chronological/historical review of case law from this Court and the Court of Appeals in this area shows that the "negligence" standard seemingly crept in without ever being analyzed and considered. See Amicus Curiae Br. of GDLA, https://bit.ly/2MCew1Z. GDLA did not address that particular issue in this brief but, if the Court is inclined to consider that issue, GDLA would appreciate the opportunity to address it.

nothing in Georgia law establishing a higher duty and because the duty sought to be imposed by the Appellee here would work an unreasonable burden on insurers.

1. A Valid Settlement Offer Within Policy Limits is Required

Under Georgia law, a liability insurance company may be liable for an excess judgment entered against its insured based on the insurer's failure to settle within policy limits. A claim for failure to settle sounds in tort. E.g., Canal Indem. Co. v. Greene, 265 Ga. App. 67, 73 (2003); S. Gen. Ins. Co. v. Ross, 227 Ga. App. 191, 196 (1997). Assuming *arguendo* that a liability insurer can be liable for negligent failure to settle, this Court has made clear that "[t]he threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes the plaintiff a duty of care[,]" which "is a question of law." Rome v. Jordan, 263 Ga. 26, 27 (1993). See also Rasnick v. Krishna-Hospitality, Inc., 289 Ga. 565, 566-67 (2011) (same); Lawson v. Entech Enters., Inc., 294 Ga. App. 305, 310 (2008) ("'[W]hat duty a defendant owes is a question of legal policy to be decided as an issue of law.'").

> The legal duty is the obligation to conform to a standard of conduct under the law for the protection of others against unreasonable risks of

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GDLA does note, however, that in the analytically similar context of indemnity bonds (i.e., contract gives surety discretion to investigate and settle claims, just like insurance policies give insurers such discretion), courts applying Georgia law have repeatedly made clear that bad faith is not the same as negligence. E.g., Nguyen v. Lumbermens Mut. Cas. Co., 261 Ga. App. 553, 554-56 (2003); Fid. & Deposit Co. v. C.E. Hall Constr., Inc., 627 F. App'x 793, 796 (11th Cir. 2015). There is no logical or policy reason for imposing disparate standards in these contexts.

> harm. The duty can arise either from a valid legislative enactment, that is, by statute, or be imposed by a common law principle recognized in the caselaw.

Rasnick, 289 Ga. at 566-67 (citations omitted).

Here, there is no statute that imposes a duty on a liability insurer regarding the settlement of claims against insureds within policy limits[5]; thus, the duty must be imposed by "a common law principle recognized in the caselaw." Rasnick, 289 Ga. at 567. The "common law principle recognized in the caselaw" with respect to a liability insurer and settling claims against an insured within policy limits is that an insurer must give equal consideration to the interests of the insured when

[5] There is actually a Georgia statute that does require liability insurers to settle claims against insureds, O.C.G.A. § 33-4-7, but that statute is explicitly limited to claims for property damage arising out of motor vehicle accidents and does not apply to bodily injury claims. See O.C.G.A. § 33-4-7(a) ("In the event of a loss because of injury to or destruction of property covered by a motor vehicle liability insurance policy. . . ."); Mills v. Allstate Ins. Co., 288 Ga. App. 257 (2007) (holding that O.C.G.A. § 33-4-7 by its plain terms applies only to an insurer's bad faith in responding to claims for property damages).

Under that statute, insurers have an "affirmative duty" to settle property damage claims. O.C.G.A. § 33-4-7(a). During the legislative process, O.C.G.A. § 33-4-7 was specifically limited to property damage claims. Kathryn H. Wade, Actions Against Insurance Companies: Change Provisions Relating to an Insurer's Liability for Bad Faith Refusal to Pay for Loss Covered by Insurance; Provide for Insurer's Duties with Respect to Settlement of Motor Vehicle Liability Policy Claims; Provide for a Private Cause of Action for Unfair Claims Settlement Practices in Certain Circumstances, 18 Ga. St. U. L. Rev. 167, 169 (Fall 2001). "The General Assembly could have given [insurers] the duty to [affirmatively settle bodily injury claims within policy limits, like it did for property damages claims], but it chose not to do so. And sound arguments can be made for that choice." Rasnick, 289 Ga. at 569.

deciding how to **respond** to a settlement demand within policy limits. E.g., Fortner v. Grange Mut. Ins. Co., 286 Ga. 189, 190 (2009); Brightman, 276 Ga. at 684-85, 687; Holt, 262 Ga. at 268-69.

This Court has explained, "[w]hether an insurance company acts in bad faith in refusing to settle depends on 'whether the insurance company acted reasonably *in responding to a settlement offer*,' bearing in mind that, in deciding whether to settle, the insurer must give the insured's interests the same consideration that it gives its own." Fortner, 286 Ga. at 190 (emphasis added) (quoting Brightman, 276 Ga. at 685-86). Similarly, in Brightman, this Court explicitly disapproved of "placing an affirmative duty on [insurers] to engage in negotiations concerning a settlement demand that is in excess of the insurance policy limits" as well as imposing "a duty to insurers to make a counteroffer to every settlement demand that involves a condition beyond their control." 276 Ga. at 687. And, in Holt, this Court "held that the insurer had a duty to its insured to *respond to the plaintiff's deadline to settle the personal injury claim within policy limits* when the insurer had knowledge of clear liability and special damages exceeding the policy limits." Id. at 685 (emphasis added). According to this Court, its "holding in Holt was consistent with the general rule that the issue of an insurer's bad faith depends on whether the insurance company acted reasonably *in responding to a settlement offer*." Id. (emphasis added).

The foregoing case law makes clear that the duty imposed on a liability insurer regarding settling claims against its insured within policy limits lies in responding to a settlement demand from the injured party. In other words, "[t]he legal duty is the obligation to" give the insured's interests equal consideration when presented with a settlement offer within policy limits to protect the insured against unreasonable risk of harm. Rasnick, 289 Ga. at 566. See also Brightman, 276 Ga. at 685 ("The rationale is that the interests of the insurer and insured diverge when a plaintiff offers to settle a claim for the limits of the insurance policy."). Moreover, this Court's refusal to place "an affirmative duty on [insurers] to engage in negotiations concerning a settlement demand that is in excess of the policy limits" and refusal to require "insurers to make a counteroffer to every settlement demand that involves a condition beyond their control" further reflects that the an insurer's duty regarding settlement of claims requires a settlement offer within policy limits from the injured party. Brightman, 276 Ga. at 687.

Notably, there is not a single case from this Court or the Court of Appeals that has held that an insurer can be liable for tortious failure to settle in the absence of a valid settlement offer within policy limits from the injured party. In fact, the Court of Appeals has held that an insurer cannot be liable for tortious failure to settle as a matter of law in the absence of a valid settlement offer. See Cotton

States Mut. Ins. Co. v. Fields, 106 Ga. App. 740, 741-42 (1962) (noting that the insured was seeking to hold the insurer liable for an excess judgment "on the mere supposition that if the defendant insurer had made an offer of compromise, then possibly the suit against the insured could have been settled within the policy limits" and describing the insured's claim as "remote, conjectural, contingent and speculative").

In Rasnick, this Court rejected an attempt to expand an innkeeper's duty to its guests. 289 Ga. at 565-70. This Court noted that the rights, duties, and liabilities of innkeepers are set forth in the Georgia code, and the statutes do not impose upon innkeepers the duty to rescue. According to the Court, "[t]he General Assembly could have given innkeepers the duty to 'investigate' or 'check on' a guest, but it chose not to do so. And sound arguments can be made for that choice." Id. at 569. This Court explained that the expanded duty was not only unwarranted as a matter of law but unworkable as a matter of fact and practicality. Among other things, this Court noted that "threshold issues would include questions involving the scope of the duty and possible triggering events," which were unworkable in practicality. Id. In finding that the circumstances did "not mandate the expansion of traditional tort concepts," this Court explained that "the notion of legal duty must be tailored so that the 'consequences of wrongs are

limited to a controllable degree.'" Id. (quoting CSX v. Williams, 278 Ga. 888, 890 (2005)).

This Court's reasoning from Rasnick is instructive in this case. For example, as noted above, O.C.G.A. § 33-4-7, which imposes an affirmative duty on insurers to settle property damage claims arising from motor vehicle accidents, does not apply to bodily injury claims. See supra note 5. "The General Assembly could have given [insurers] the duty [to affirmatively settle bodily injury claims], but it chose not to do so. And sound arguments can be made for that choice." Rasnick, 289 Ga. at 569. Expanding an insurer's duty regarding settlement is unwarranted as a matter of law and unworkable as a matter of fact and practicality. If an insurer's duty to settle arises when it knows or reasonably should know settlement within the insured's policy limits is possible, threshold issues involving the possible triggering event would be unworkable, as the outcome would hinge entirely on "after-the-fact testimony of the injured party that he would have settled within the policy limits[,]" which would "be unreliable because it is speculative," and would provide a potential incentive for "collusion between the insured and the injured party." Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1552-53 (11th Cir. 1991) (expressing doubt that a rule requiring an insurer to settle when it "knows or in the exercise of ordinary care should know that a suit against its insured could be settled within the policy limits" was "justified from a policy

standpoint"). Similarly, such a rule would not be "tailored so that the 'consequences of wrongs are limited to a controllable degree.'" Rasnick, 289 Ga. at 569.

The Third Circuit Court of Appeals aptly explained why imposing an affirmative duty on insurers to initiate settlement negotiations makes little sense:

> Traditionally and logically, the impetus for settlement comes from the plaintiff. He is the one seeking recovery and therefore has the burden of stating just what it is that he wants. A feigned lack of interest in settlement by a defendant is a widely recognized negotiating ploy. We see no reason why use of this technique should excuse the plaintiff from stating his demand.

Puritan Ins. Co. v. Canadian Universal Ins. Co., 775 F.2d 76, 82 (3d Cir. 1985).

The Texas Supreme Court has likewise explained,

> From the standpoint of judicial economy, we question the wisdom of a rule that would require the insurer to bid against itself in the absence of a commitment by the claimant that the case could be settled within policy limits. Considering the negotiation incentives for each party, we conclude that the public interest favoring early dispute resolution supports our decision not to shift the burden of making settlement offers [] onto insurers.

Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 851 (Tex. 1994). See also id. at n.18 (describing problems in detail).

In sum, the legal duty on liability insurers regarding settlement of claims against insureds that arises from common law principles recognized in the case law from this Court and the Court of Appeals requires an injured party to present a settlement offer within policy limits to the insurer. There is no sound legal or

policy reason to expand that duty to when the insurer knows or reasonably should know settlement within the policy limits is possible. As this Court has explained,

> To conclude otherwise in this case would be an epitomization of the adage "bad facts make bad law." In light of a legislative reluctance to do so and in recognition of clear considerations of policy and pragmatism, we decline to judicially engraft into the caselaw of this State, the additional duty upon [insurers to affirmatively initiate settlement negotiations in the absence of a settlement demand within policy limits from the injured party], as urged by [Appellee].

Rasnick, 289 Ga. at 570. Accordingly, GDLA respectfully submits that the answer to the second question in the Court's Order granting certiorari is an insurer's duty to settle arises only when the injured party presents an offer to settle within the insured's policy limits.

IV. CONCLUSION

For the foregoing reasons, GDLA, as *amicus curiae*, respectfully submits that this Court should reverse the decision of the Court of Appeals and reinstate the trial court's order granting summary judgment to First Acceptance.

Respectfully submitted this 4th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** upon all counsel of record by depositing a copy of the same in the United States Mail, postage pre-paid, addressed to the following counsel of record:

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