IN THE SUPREME COURT

STATE OF GEORGIA

CASE NUMBER S11C1555

ZUBEIDA MUKTAR,

Petitioner,

vs.

CEDRIC PENN and TINA PENN,

Respondents,

AMICUS BRIEF IN SUPPORT OF WRIT OF CERTIORARI BY GEORGIA DEFENSE LAWYERS ASSOCIATION

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STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (hereinafter "GDLA"), consists of approximately 600 attorneys, including sole practitioners and members of law firms of all sizes throughout the State, who engage in litigation primarily for defendants in civil lawsuits. Recent appellate court rulings have affected the ability of GDLA members to compromise disputes in such a way as to end or avoid protracted litigation, to protect clients from further litigation and/or personal liability, to protect insurers from potential bad faith claims and to protect themselves from legal malpractice claims. While this Court has heard from the litigants and insurance companies, GDLA submits its brief in support of Petitioner Zubeida Muktar's Petition for Writ of Certiorari from the perspective of Georgia defense lawyers.

INTRODUCTION

Frickey v. Jones, 280 Ga. 573 (2006) held that an acceptance that required an additional act is not an acceptance of an offer, but a counteroffer. In Frickey, defense counsel's acceptance required the additional act that plaintiff resolve a hospital lien. That holding reiterates first year law school Basic Contracts; however, there is more to the Frickey holding and more to this case than "the simple application of settled Georgia contract law to undisputed facts" as Respondents contend. Response Opposing Petition for Writ of Certiorari, p. 2.

The Frickey case ignited a firestorm regarding Time Limited Settlement Demands. The time limited demand has become a basic weapon in the claimants' and plaintiffs' attorneys' arsenal, which have insurers, litigants and attorneys struggling to frame a response. When used in good faith, a Time Limited Demand is designed to convey to the insured tortfeasor, his or her insurer and their attorneys: (1) the basis of the claim; and (2) acceptable terms of settlement. If the case is not settled, the lack of settlement can be asserted as evidence of bad faith in a bad faith action against the insurer if a judgment exceeds the insured's available policy limits.

While Respondents contend that this is a contract formation case, not a negligent failure to settle case, if no settlement is found, the result will be a trial on the Respondents' claims; followed potentially by another appeal; followed likely by an assigned Bad Faith claim against State Farm seeking recovery over and above the amount of liability insurance available under the Muktar's policy; followed by yet another appeal with regard to that bad faith claim. While it is true that the question of whether or not failure to meet a time limited demand evidences bad faith remains a question governed by the pertinent facts, defense counsel in this state need this Court to address the issues of contract formation so that they can avoid the pitfalls presented in this and other cases where the insurer

wants and intends to accept the demand but is met with disingenuous claims of "counter offer" which are nothing but a pretext to set up a Bad Faith failure to settle claim.

As a result of Frickey, some claimant's attorneys are no longer required to and are not making their time limited demands in good faith. To the contrary, those attorneys are designing these demands so that they are, as the trial judge noted in this case, "not capable of being accepted," inadequately addressing key issues such as:

- Who will sign the release?
- What claims will be released?
- Who will be released?
- What release language is acceptable?[1]
- What, if any, exposure for UM subrogation will the released parties face?
- What liens exist and how will the liens be resolved?

[1] See, for example, language contained in a recent time limited demand received by a GDLA member: "a proposed Release or a statement on the settlement check that purports to release or resolve 'any and all' claims will be considered as a counteroffer and rejection of this offer." Does that mean that a release including the language, "any and all claims for personal injuries arising from the (date) accident against (insured driver)" is a counteroffer because it used the words "any and all"?

Members of GDLA have been placed in impossible situations in responding to these demands, having to deal with:

- Demands that include conditions which are contrary to law, as in this case, where Respondents demanded a limited liability release that only releases the insured, but not the insurer, and still allowed claimants to pursue UM claims. See O.C.G.A. §33-24-41.1 (a limited liability release "shall" release the insurer).
- Demands that are contrary to law in that they do not take into account valid medical liens. In these cases, the holder of valid liens may have a claim against the insured, personally, or against the insurer for the amount of the lien, up to the policy limits, resulting in a double payment by the insurer.[2] See also, Amicus Brief of Georgia Farm Bureau.

[2] Another example of language contained in a recent time limited demand received by a GDLA member: "if there is any language in the proposed Release that requires or even requests plaintiff to make representations or warranties regarding the absence of medical liens or hospital liens or bankruptcy proceedings relating to him, the requirement or request will be considered a counteroffer and rejection, resulting in the immediate and permanent withdrawal of this offer. Please be aware that a requirement or even a request for a "Lien Affidavit" or similar document by any other name will be considered a counteroffer and rejection resulting in the immediate and permanent withdrawal of this offer."

- Demands that are internally contradictory. In such cases, claimants' attorneys treat any reasonable inquiry by the insurer or counsel seeking clarification as a counteroffer.
- Demands that refer to a "release" but fail to include a document that claimants would accept.[3] Claimants' counsel then treats any inquiry regarding language or any proposed release prepared by the insurer or counsel as a counteroffer.
- Demands, as here, that agree to settle only the personal injury claims of the plaintiff and not any property damage claims. This leaves potential defendants exposed to future claims for property damage over and above the available property damage liability limits.
- Demands made after the insurer has repeatedly offered the policy limits for a claim, even before a plaintiff's attorney is involved. Rather than simply accepting the insurer's good faith offer, claimants' attorneys

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[3] Language contained in a recent time limited demand received by a GDLA member: "We have supplied you with all information necessary to evaluate this demand; however, should you have any questions regarding this demand, please do not hesitate to contact me at the above. Additionally, *although any requirement or request for terms and conditions of settlement and compromise that are not approved herein will constitute a counteroffer and rejection of this demand*, if you feel that any part of this letter needs clarification in order for you to comply with its terms, we will be happy to offer any clarification of terms so that you have a full and fair opportunity to comply with this demand."

will submit a time limited demand that is difficult or impossible for insurers and attorneys to accept.

- Demands requiring a joint sworn statement by the insured and insurer. If complied with, this would require the insured to swear to facts only the insurer knows, and vice versa.
- Demands for settlement of only the injured plaintiff's claims, but not the claims of his or her spouse. Accepting such a demand leaves the insured exposed to a future loss of consortium claim (which is considered a property damage claim under Georgia law) by the spouse whose claims were not released (and possibly a legal malpractice action against the attorney).
- Demands that agree to release only the insured driver, and not any other party with potential liability pursuant to the family purpose doctrine, negligent entrustment, respondeat superior or other theories of vicarious liability, leaving the insured and attorney exposed as noted in the item above.
- Demands excluding payment by paying into the registry of the court or through filing of an interpleader action. If the insurer or defense attorney feels there is a question with regard to claims on these funds

(for example, a Medicare or Medicaid lien, or ERISA health plan reimbursement claims) he is prohibited from seeking guidance from the court without risking resources of his insurer and/or insured clients.

- Demands that will terminate upon the filing of a declaratory judgment action[4], which is filed in order to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. An insurer that is uncertain about whether there is coverage available seeks counsel from the court at its own peril, and if the court finds coverage, the insurer cannot then accept the demand. An insurer would be unable to file such action unless it is certain of its success; however a declaratory judgment action requires uncertainty.
- Demands with an unreasonable time limit. See Amicus Brief of Georgia Farm Bureau.

CERTIORARI IS APPROPRIATE IN THIS CASE

Despite Respondents' contention that this case is not appropriate for certiorari, Petitioner is asking the Supreme Court to do just what it did in Frickey: grant "a writ of certiorari to the Court of Appeals . . . to consider whether that court erred in ruling that the evidence of record failed to establish the existence

[4] Language in a recent demand received by a GDLA member: "filing a declaratory judgment action will result in the immediate automatic and permanent withdrawal of this offer of compromise."

and terms of an enforceable settlement agreement." Frickey v. Jones, 280 Ga. 573, 573, 630 S.E.2d 374, 375 (2006).

The examples listed above represent recurring dilemmas faced by GDLA members and their clients (insureds, insurers and individuals) on a regular basis. GDLA members need a safe harbor so they can avoid failing to meet a demand that down the road would be considered bad faith on the part of their insurer clients, expose individual clients to excess personal liability and potentially expose themselves to legal malpractice claims. This Court needs to hear this case so that it can require such demands to be made in ***good faith***[5] and be ***capable of acceptance***. The Court needs to provide guidance to defense counsel when faced with vague demands that they must mirror with little specification as to how. It is these sorts of impossible situations that defense counsel in this state need this Court to address by granting certiorari.

The current law and the Court of Appeals' decision in this case run counter to public policy promoting compromise, finding that a settlement has been reached, dealing in good faith among attorneys and promoting judicial economy. GDLA believes that the current state of the law will cause a continuing

[5] Good faith should allow for reasonable inquiry without such inquiry being deemed a counteroffer, thereby avoiding settlement and resulting in extended litigation (i.e., one lawsuit against the insured tortfeasor followed by a second lawsuit against the insurer for bad faith).

deterioration in the way attorneys deal with one another, a decline in professionalism among attorneys and an excess of expensive litigation. Under these circumstances, GDLA believes this case to be of great concern, gravity and importance to its members, to members of the plaintiffs' bar, and to the public.

Finally, this Court needs to clarify recent Court of Appeals' decisions so that attorneys can know what constitutes a settlement agreement and what does not. In the case at bar, the Court of Appeals found that the "proposed" release sent by Petitioner constituted a counteroffer. Just over two months after the Muktar decision, the Court of Appeals held that "the presentation of a proper release in a form acceptable to plaintiff may have been a condition of defendant's performance **but it was not an act necessary to acceptance of plaintiff's offer to settle for the policy limits**." Smith v. Hall, Court of Appeals of Georgia No. A11A1042, July 21, 2011 (emphasis supplied). As Respondents argue, "certiorari is for resolving important and unsettled issues of law that will arise in other cases. . . ." Certainly an analysis of these two cases shows that the issues are unsettled.

Both Muktar and Smith involved personal injury claims that arose out of automobile accidents. The trial courts in both cases granted defendants' Motions to Enforce Settlement. Both cases involved demands for the defendants' automobile liability policy limits. The Defendants in both cases sent the

plaintiffs a letter accepting the plaintiffs' demand (In Smith: "we hereby accept your demand for settlement." In Muktar: "in acceptance of your clients' settlement demand. . . ."). In various forms, both defendants provided plaintiffs' counsel with checks, releases, indemnification agreements and lien affidavits. Defense counsel in Muktar provided a "proposed" release. Defense counsel in Smith provided a general release, but offered to provide a Limited Liability Release if requested. Despite the similarities, the Court of Appeals in Muktar found no meeting of the minds ("the letter and proposed release 'in effect' asserted a counteroffer") while the Court of Appeals in Smith found there was a valid agreement (the "inclusion of a general release was merely a suggestion of how to terminate the lawsuit. . . .").

ARGUMENT AND CITATION OF AUTHORITY

I. The Offer.

The time limited demand in this case was preceded by no phone calls, with Respondents' attorney insisting that everything must be in writing. Respondents' counsel refused to return Petitioner's counsel's phone calls. Despite Respondents contention that their offer was not silent as to the particular terms of the release, the only specifications with regard to what would be an acceptable release were: "Therefore we need a release of my clients' bodily injury claims against only your insureds that preserves their rights to recover uninsured motorist benefits."

Under the holding of the Court of Appeals, defense counsel are required to take these twenty-four words and figure out how to draft an acceptable release that accomplishes a release of plaintiffs' claims while satisfying plaintiffs' counsel's requirements. Defense counsel can deduce from these limited instructions that, since Respondents want to preserve their rights to recover uninsured motorist benefits, they must need a limited liability release as is provided for in O.C.G.A. §33-24-41.2. However, that code section requires that the ***insurer*** must be released. But if the release may release "only your insureds," will a statutory limited liability release satisfy plaintiffs' counsel? Can defense counsel use the form Limited Release contained in Georgia Automobile Insurance Law? See Jenkins & Miller, Georgia Automobile Insurance Law, 2010-2011 edition.

If the Court reviews a typical limited liability release, as found in Jenkins & Miller or as prepared by Petitioner's counsel, it would see that Respondents' counsel was silent as to a great number of terms that are customarily included in a Limited Liability Release. The Respondents even so much as admit that they were not specific about all the terms that might be included in "the release": "it was very specific about ***some*** of those terms." Respondents' brief, p. 18.

The Petitioner's attorney, faced with a "no call" rule and either a demand made in bad faith incapable of acceptance or an inarticulate demand made in good faith and capable of acceptance was faced with a serious dilemma: what to

do to protect his client. He wanted to pay the limits and get a limited liability release, but how? Could he ask Respondents' counsel to provide him with an acceptable release, or would that be a counteroffer? Could he have made a list of potential terms and asked Respondents' counsel which would be acceptable, or would that be a counteroffer? Could he have proposed to use the form for Limited Liability Releases in Jenkins & Miller, or would that be a counteroffer?

II. The Acceptance.

Petitioner's counsel did the only thing he could do – provide what was likely a form release and offer for the Respondents' attorney to edit it to meet his requirements. This would seem a reasonable option for defense attorneys faced with a situation where Respondents' counsel would not return phone calls and insisted that all communications be in writing. This way, with cooperation from the plaintiff's attorney, defendant would have ensured that the acceptance of the offer did not vary from the offer.

III. Public Policy encourages negotiation, compromise and settlement; professionalism and ethics require attorneys to act in the spirit of cooperation and fair-dealing; and the courts require judicial economy.

The courts recognize a strong public policy encouraging negotiations and settlements. Robinson v. Robinson, 261 Ga. 330 (1991); Williams v. St. Paul Company, 228 Ga. App. 656 (1997).

The Georgia Bar Association's aspirational ideals regarding professionalism are:

> As to opposing parties and their counsel, I will aspire:
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> (a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties. . . .
>
> (b) To treat opposing counsel in a manner consistent with his or her professional obligation and consistent with the **dignity** of the search for justice. As a professional, I should:
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> * * *
>
> (3) Respond promptly to all requests by opposing counsel.
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> * * *
>
> As to the courts, other tribunals, and to those who assist them, I will aspire:
>
> (a) To represent my clients in a manner consistent with the proper functioning of a **fair**, **efficient** and **humane** system of justice. As a professional, I should:

(1) Avoid non-essential litigation and non-essential pleading in litigation;

(2) Explore the possibilities of settlement of all litigated matters.

See Aspirational Statement on Professionalism, Part IX Professionalism, 2010-2011 Georgia State Bar Handbook, p. H-148-149 (emphasis supplied). While these are all aspirations and not bar requirements, "Chief Justice Clarke has often said that 'ethics is that which is required and professionalism is that which is expected.'" Green v. Green, 263 Ga. 551 (1993) (persuasive authority only). The Court in Green further noted, "if the bar is to maintain the respect of the community, lawyers must be willing to act out of a **spirit of cooperation** and **civility** and not wholly out of a sense of blind and unbridled advocacy." Id. (emphasis supplied).

> We must encourage those lawyers who are willing to negotiate rather than litigate because willingness to negotiate is one of the **highest forms of professionalism**. While I agree with the result which vacating the grant of appellant's application for discretionary appeal will bring about in this case, I feel it is necessary to be sure that the message we might send to the parties when their conduct falls miserably short of the aspirational goals of professionalism is not one of condonation.
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> Evanoff v. Evanoff, 262 Ga. 303, 304 (1992) (emphasis supplied).

The American Bar Association's Section of Litigation has published "Ethical Guidelines for Settlement Negotiations," a resource designed to facilitate and promote ethical conduct in settlement negotiations. Among the recommendations are that "a lawyer's conduct in negotiating a settlement should be characterized by **honor** and **fair-dealing**" and "**an attorney may not employ the settlement process in bad faith.**" (Emphasis supplied).

These judges and guidelines are eloquent in their expectations – dignity, honor, fair-dealing, spirit of cooperation, etc. The holding by the Court of Appeals in this case does not appear to be "consistent with the dignity of the search for justice," appears inconsistent with a "fair, efficient and humane system of justice," fails to encourage a "spirit of cooperation and civility," and diverges from notions of honor and fair-dealing. Rather, it seems to provide support for blind and unbridled advocacy.

IV. Respondents made a good faith demand that was accepted.

Respondents' demand required three things: (1) insurance information; (2) a check for the policy limits of $50,000 and (3) "a release of my clients' bodily injury claims against only your insureds that preserves their rights to recover uninsured motorist benefits." Petitioner's counsel provided those three things prior to the expiration of the twenty-day time limit.

The release accomplished that which Respondents' counsel required: it preserved their claims against a UM carrier. To the extent that it also released State Farm, that issue has been fully briefed above.

As the trial court found, the fact that the release contained language that Respondents' counsel did not anticipate does not invalidate the settlement. Respondents' demand letter did not identify any language that could **not** be included in the release and their complaint now that terms that were not specifically discussed or specified in the demand letter were included does not transform the proposed release into a counteroffer. Mealer v. Kennedy, 290 Ga. App. 432 (2008). To the contrary, the release was merely a suggestion of how to terminate the lawsuit. Smith v. Hall, *supra.* If Respondents' counsel had specific requests about language that could or could not have been included in the release, he should have been specific about it in his demand letter. The proposed release accomplished what claimants desired – the ability to pursue any claims they had against their UM coverage, whether it be for bodily injury and/or property (including but not limited to loss of consortium).

The question really should not be what specific terms Petitioner's counsel included in the release. The questions should be why Respondents' counsel was not willing to work with Petitioner's counsel in preparing an acceptable release; why Respondents' counsel was not more specific; why Respondents' counsel did

not offer up a release that his clients would have been willing to sign? The answer is that being clear about the demand would prevent Respondents' counsel from possibly getting more money than was available under the Muktar's liability insurance policy by way of a subsequent bad faith claim.

Finally, the Respondents' offer in this case was made from a superior bargaining position couched in a language chosen solely by Respondents. F & F Copiers v. Kroger Co., 194 Ga. App. 737 (1990). In other words, an adhesion contract. Claimants have turned the tables on insurance companies who are often considered to be the party with the superior bargaining position. Lemieux v. Blue Cross & Blue Shield of Ga., Inc., 216 Ga. App. 230 (1994). However, here, the claimant is proposing nothing less than an adhesion contract: a standardized contract offered on a "take it or leave it" basis and under such conditions that a consumer cannot obtain the desired product or service except by acquiescing in the form contract. Walton EMC v. Snyder, 226 Ga. App. 673 (1997). However, in the case of this time limited demand, the offeror does not even let the offeree know what the terms of the adhesion contract are. The consequence of an adhesion contract is that it is construed against the party in the superior position. Id.; St. Paul Fire & Marine Ins. Co. v. Snitzer, 183 Ga. App. 395 (1987). Therefore, the Court should construe this offer/demand against Respondents.

V. Alternatively, Respondents' offer was in bad faith and incapable of acceptance.

An ethical and professional settlement offer made in good faith should contain the following, at a minimum: (a) an itemization of all potential claims; (b) specification of the amount proposed to resolve each specific claim; (c) a copy of a release satisfactory to the claimant, or an invitation to defense counsel to propose a specific type of release (general or statutory limited liability release that conforms with Georgia laws); (d) identification of the party or parties who will sign the release (claimant and any derivative claimant); (e) identification of the parties to be released[6]; (f) the means of acceptance; (g) details of any and all uninsured motorist coverages available, including whether the policies are standard or excess and the limits so that defense counsel can inform the insured of any potential personal exposure by way of an uninsured motorist subrogation claim; and (h) information regarding any and all known liens and encumbrances on any settlement proceeds and how they will be resolved. Requiring these specifics would provide a safe harbor for attorneys faced with these demands and

[6] For example, assume husband and wife are both named insureds on a policy and wife is in an accident. If plaintiff agrees to release wife only for the available policy limits, husband may be subject to a suit, but since the policy limits have been exhausted, the insurer would have to provide a defense, but there would be no coverage for indemnification of claims against him.

promote Georgia's public policy of encouraging negotiations and settlements and would encourage ethical and professional conduct from attorneys.

An ethical and professional settlement offer must allow for good faith communications between the parties' attorneys, including allowing an insurer or its attorney to make reasonable inquiry into the specific terms of the demand without it being considered a counteroffer.

The Court must require that that **settlement demands** and offers **be made in good faith**[7] so that the settlement process can proceed with honor and fair-dealing, so that the court encourages negotiation rather than litigation, settlement and compromise rather than trial, and so that professionalism is promoted.[8] This Court needs to review this case and refuse to condone conduct which is not ethical or professional but is designed as a game of Gotcha.

The conduct of Respondents' counsel in this case is analogous to that of defense counsel in Jones v. State, 276 Ga. 171, 174, 575 S.E.2d 456 (2003). In

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[7] Good faith is defined as an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious; that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. Black's Law Dictionary, Abridged Sixth Edition (1991).

[8] The State Bar of Georgia finds professionalism so important that it requires its members to have at least one hour of continuing education in professionalism each year.

Jones, a criminal defense attorney representing multiple clients filed separately, and in each case, a notice of leave of absence and a demand for speedy trial. Id. at 171. The gist of the strategy was to prevent the State from having an opportunity to try the defendants within the time allowed by law. To that end, defense counsel filed the aforementioned and several other pretrial motions. Id. On more than one occasion, the defendants appeared for trial, but defense counsel failed to appear, relying on his leave of absence. Incidentally, the leave was defective and the Court found that defense counsel waived his right to a speedy trial based upon his actions. Id. at 174. The Court noted that "[t]he ***object of all legal investigation is the truth, and the procedural rules are in place to further such goal in an orderly fashion.***" Id. "Contrary to the view of some, ***our legal system is not simply an elaborate game of Gotcha***!" Id. (emphasis supplied).

Frickey v. Jones has created the unintended consequence of a game of Gotcha. Claimants are able to 'set up' insurers for claims of bad faith that lead to additional, expensive litigation. 280 Ga. 573 (2006).

The "demand" here included a request that State Farm provide verification of insurance coverage available, which State Farm complied with as discussed above. The remainder of the conditions of settlement are contained in the following paragraph:

> My clients have uninsured motorist coverage available under two policies in the amount of $25,000 each.[9] Therefore we need a release of my clients' bodily injury claims against only your insureds that preserves their rights to recover uninsured motorist benefits. If you get me all of the requested insurance information with **that release** and a draft for the available bodily injury liability insurance within twenty days of this letter, then my clients will sign **the release**. The proper distribution of any proceeds will be my responsibility. (emphasis supplied).
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> (R. at 48).

There is no question that State Farm forwarded the settlement proceeds, the policy limits. The question is whether State Farm provided "the release" or "that release" that met the subjective and ill-defined requirements of the demand.

Respondents here contend that "we need a release of my clients' bodily injury claims against only your insureds that preserves their rights to recover uninsured motorist benefits" is sufficiently clear for defense counsel to be able to accept the offer and prepare a release that satisfies all of Respondents unspecified requirements. In reality, it is impossible for a defense attorney to take one sentence of information from a demand letter and draft a complete release, without some additional input from claimants' attorney. In fact, it is difficult, even after briefs to the Court of Appeals and this Court, to figure out exactly what (if anything) may have satisfied Respondents' counsel. The request clearly

[9] By failing to specify whether this coverage was excess to liability coverage or entitled to the liability insurance set off, defense counsel cannot advise his clients of what, if any, exposure they may face.

requires a Limited Liability Release, which is defined by statute and requires a release of the insurance carrier. O.C.G.A. § 33-24-41.1.

If counsel for the insured had drafted the release as requested and did not include State Farm[10], Respondents' counsel would no doubt argue that, since O.C.G.A. §33-24-41.1 is in derogation of the common law it must be strictly construed. By not strictly complying with the requirements of the statute, defense counsel drafted what could be construed as a full release, which is not acceptable given the offer[11]. Here, defense counsel chose to follow the statute, and Respondents' counsel balked because he specified that only the insureds were to be released. Even with the simplest of releases, Respondents' attorney has placed the insurer in a Catch-22 and either proposed release (including or not including State Farm) would be objectionable.

The release that Respondents apparently would agree to – one that did not release State Farm, did not release the insured's heirs, executors, administrators, agents, attorneys and assigns, did not release Respondents' property damage

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[10] The Court of Appeals agreed that, despite the clear language of the settlement offer that the release was for "claims against only your insureds," it "necessarily implied an offer to release State Farm. . . ."

[11] In support of their contention that O.C.G.A. §33-24-41.1 is not the only method for a limited liability release, Respondents cite Southern Guaranty Insurance Company v. Dowse, 278 Ga. 674 (2004). This case has nothing to do with a release of an insured that preserves claims against a claimant's own UM carrier under O.C.G.A. § 33-24-41.1.

claim (even though Respondents' attorney agreed to release the derivative loss of consortium claim, which is a property damage claim) – is one that would be legal malpractice for defense counsel to agree to were it not for the threat of a bad faith claim. Unfortunately, under the duress of a Frickey time limited demand, defense attorneys have to weigh two options: agree to a release that fails to release all claims or open up their client to an excess verdict and the insurer to a bad faith claim. Similarly, a defense attorney who prepared a release that failed to release existing derivative claims could be subject to claims of malpractice. A defense attorney who settled a claim without bothering to find out about liens could be subject to claims of malpractice. A release that did what Respondents demanded fails to do what a release should do and what public policy dictates: settle the case and avoid additional litigation.

Respondents' counsel also finds fault with and seems to spend an inordinate amount of time questioning Petitioner's correspondence sent with the proposed release requiring Respondents' counsel to hold the draft in trust pending execution and return of the release. The demand stated that when the documents were delivered, "then [Respondents] will sign the release." For Respondents to find fault with the customary requirement that the release be signed before the money is disbursed is simply further evidence of the sort of minefield defense attorneys face when attempting to respond to a time limited

demand. The release is the consideration for the payment of the settlement funds and simple common sense holds that the settlement funds should not be released until the release is signed. Custom dictates that when attorneys are involved, an insurer can send a check and release to the attorney and expect the attorney will not release the funds until the release is signed. The alternative is to do as attorneys do with pro se claimants – have the claimant sign and return the release before sending the check. Of course, that would not be acceptable under the terms of the time limited demand and would be considered a counteroffer. The legal environment as it seems to be heading will one day require that the parties and counsel all get together and have a "closing" of the deal such that defense counsel can ensure that he gets the appropriate documents signed before plaintiff gets the money.

Defense counsel here did the only thing he could do. He prepared a release that met the Respondents' criteria (containing statutory and customary language[12]

[12] Respondents complain that the release included the heirs, executors, administrators, agents, attorneys and assigns; that it included an indemnity agreement; that it included language regarding liens; and that it included a financial responsibility clause. These clauses are standard language that are commonly found in releases and other settlement documents. If Respondents' attorney did not want these standard clauses included, he should have anticipated that Petitioner's attorney would have included them and specified that he would not agree to those terms. Anticipating that Respondents' attorney would find some fault with the release, counsel for Petitioner offered the release as a proposal and invited any changes.

that Respondents' counsel had not specified should ***not*** be included) and forwarded it to him as a "proposal." Had Respondents' counsel been willing to respond to phone calls to discuss the contents, the lawyers could have worked out the details so that State Farm could provide the required release within the deadline. Instead, Respondents' attorney insisted that everything be in writing, no doubt so that any inquiry could be considered a counteroffer or added condition. (R. at 103, 154).

The Plaintiffs' bar in this state has learned from cases like Herring v. Dunning, 213 Ga. App. 695 (1994) and Pourreza v. Teel Appraisals & Advisory, Inc., 273 Ga. App. 880 (2005), cited in Respondents' brief and Mealer v. Kennedy, 290 Ga. App. 432 (2008). In those cases, the offers were accepted by a promise and disputes over release language arose after a meeting of the minds as to settlement had occurred. Based on those holdings, claimants' attorneys now are requiring the insurer and its attorneys to accept demands by performance – as here, by forwarding a check, insurance information and "a release." However, the insurer and attorney are stuck in an impossible situation because no release that they propose will satisfy the claimants attorney's subjective and unspecified requirements. If the defense attorney can glean from the demand precisely what

the claimants' attorney wants, it will likely result in a release that leaves someone (the insured, the insurer, and possibly even the plaintiff[13]) open to future claims.

Respondents cite Johnson v. Martin in support of their contention that the release was too broad. 142 Ga. App. 311 (1977). See Amicus Brief of Georgia Farm Bureau (pointing out that this 1977 decision was made before later decisions holding that the release of one defendant was not the release of all defendants, Posey v. Medical Center – West, 257 Ga. 55 (1987) and that only parties specifically named were released, Lackey v. McDowell, 252 Ga. 185 (1992)). However, Respondents here only asked for a release that would allow them to pursue UM coverage. The proposed release did not limit Respondents' ability to do that. Wyatt v. House is similarly distinguishable. 287 Ga. App. 739 (2007). There, defendant produced a full release rather than the limited liability release that claimant requested.

To allow this game of Gotcha to continue in Georgia will result in there being no meaning to liability limits of insurance. If an injury is serious enough, a claimant can make an "offer" due to its subjective and unspecified requirements that an insurer is incapable of accepting. When, as planned, the insurer fails to

[13] In the case of an unsatisfied lien, the medical provider filing the lien may have an action against the insurer and/or insured if claimants do not pay the lien from the settlement proceeds. The insurer or insured then may have a claim against the claimants to recover the payment made on their behalf. The net result of all of this is more litigation.

accept claimant's terms, it is opened up to a potential bad faith claim, negating any limits on the policy. It would be impossible for any insurance company to actuarially compute premiums for insurance policies because there are no longer limits to what the insurer must pay out on any particular policy.

VI. Conclusion.

This Court should accept certiorari to review the findings of the Court of Appeals and affirm the trial court's grant of Petitioner's Motion to Enforce Settlement and denial of Respondents' Motion for Partial Summary Judgment. Respondents' demand required three things and Petitioner delivered those three things within the imposed time limit. The release proposed by Petitioner conformed as well as it could with the vague and contradictory requirements of the Respondents. If it did not conform, it is only because the Respondents made their demand intentionally too vague, too subjective, and too indefinite to be capable of acceptance.

This case reaches beyond the mere interpretation of contracts and GDLA is not asking this court to overthrow or overhaul centuries-old contract law. However, time limited demands used in this manner are special situations that require a unique analysis. Beyond consideration of contract law, this case demands consideration of Georgia's strong public policy encouraging negotiations and settlements and avoiding unnecessary litigation. It demands

consideration of ethics and professionalism required of members of the bar and the Court should take this opportunity to condemn the lack of professionalism and insist that members of the bar should follow the rules and aspirations regarding ethics and professionalism and should conduct good faith settlement negotiations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served opposing counsel in the above captioned case with a copy of the foregoing pleading by depositing same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

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