

IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S21C1252

STEPHAN DUWAYNE WHITE,

Petitioner,

v.

WALTER CHEEK,

Respondent.

**GEORGIA DEFENSE LAWYERS ASSOCIATION'S AMICUS CURIAE
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI¹**

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¹ A copy of this Court's August 26, 2021 Order granting GDLA's Motion to File Brief of Amicus Curiae is attached hereto.

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I. INTRODUCTION

Enough is enough. The continuation of the “gotcha” tactics being advanced by the respondent, while may constitute great advocacy, are damaging the core principles of professionalism which form the foundation for the practice of law. Even the oath of this Court requires attorneys to conduct themselves “uprightly.” The Merriam-Webster dictionary defines “upright” as “marked by strong moral rectitude.” There is nothing upright by drafting settlement demands designed both to confuse recipients and for the purpose of causing recipients to make purported “mistakes.” The gotcha tactics present in this case are analogous to a plaintiff’s medical malpractice attorney appearing in an operating room, intentionally distracting the surgeon, causing the surgeon to make a mistake, and then offering to represent the patient in a malpractice action against the surgeon. As a matter of public policy, this Court should do everything within its power to eliminate such practices. This Court can start by clarifying and fixing the unintended consequences of its previous holding in *Grange Mutual Casualty Company vs. Woodard*, 300 Ga. 848 (2017) (hereinafter “the *Grange* case”).

II. ISSUES PRESENTED

1. Does the *Grange* case stand for the proposition that essential/material conditions of a contract are open to subjective interpretation?

2. Did voicemails left by the petitioner's insurer reject a settlement demand, even though the voicemail had nothing to do with the demand?

III. STANDARD OF REVIEW

Rule 40, which governs the standard for granting certiorari, provides that “[a] petition for the writ will be granted only in cases of great concern, gravity, or importance to the public.” Ga. Sup. Ct. R. 40. Here, Georgia Defense Lawyers Association's lawyers, their clients, and their clients' insurers are being overwhelmed with “gotcha” settlement demands designed to cause recipients to make “mistakes” for the purpose of potentially exposing insurers to uncapped liabilities. This is largely the result of the Georgia Court of Appeals' overly broad interpretation of the *Grange* case, which was intended to deal with the narrow issue relating to the timing of a settlement payment. This problem can be easily fixed if the Court grants this petition and clarifies that the *Grange* case, despite perceived language to the contrary, was never intended to intimate that an agreement of immaterial/non-essential terms was required before a settlement could be enforced.

IV. STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (“GDLA”) is an association of nearly 1,000 lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The

GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. Though its membership is diverse, GDLA members frequently represent their respective clients in various tort actions where settlement demands are made and designed by plaintiff lawyers not to reach settlements, but to set up bad faith claims.

The GDLA and its members share a common interest in ensuring basic principles of fairness and common sense. Additionally, the GDLA, its members, and their clients share a common interest in ensuring the ability to freely communicate with their counterparts on the other side of the “v,” without fear that simple verbal and professional communications can lead to the filing of additional lawsuits. The GDLA respectfully contends that this Court never intended to validate “gotcha” demands with its decision in the *Grange* case and that any such interpretation must now be fixed by this Court.

V. ARGUMENT AND CITATION OF AUTHORITY

Nowhere in the former version of O.C.G.A. § 9-11-67.1 or the current version is there language which states that making an inquiry can be considered a counteroffer. Instead, the statute states that any attempt for reasonable clarification

“shall not be deemed a counteroffer.” O.C.G.A. § 9-11-67.1(d).² There is zero legal authority for the proposition that asking a question can be deemed a counteroffer. Furthermore, there is no authority supporting Respondent’s position that the new version of O.C.G.A. § 9-11-67.1(d), which states that “[a]n attempt to seek reasonable clarification shall be in writing,” automatically turns a verbal request for clarification into a counteroffer. If anything, the new version of O.C.G.A. § 9-11-67.1(d)’s reference to the clarification being in writing means that a request which is not in writing is effectively nonexistent. Nonetheless, at the time of the settlement in this case, the statute did not contain any language indicating that inquiries had to be in writing.

“The cardinal rule of statutory interpretation is to ascertain the legislature’s purpose in enacting a statute and then construe the statute to effect that purpose, avoiding interpretations that do not ‘square with common sense and sound reasoning.’” *Insurance Dept. of State of Ga v. St. Paul Fire & Cas. Ins. Co.*, 253 Ga. App. 551, 552 (2002). The clear intent of O.C.G.A. § 9-11.67.1 was to put an end to “gotcha” tactics, not to expand them. Is it really the position of the State of

² Of note, in this case, the voicemails did not violate the conditions of the settlement demand. The demand stated that any inquiries about the settlement offer had to be in writing. The voicemails had nothing whatsoever to do with the demand itself. Rather, the insurer left voicemail messages asking for a recorded statement from the claimant in relation to the insurer’s liability investigation, which was entirely unrelated to any questions about the demand itself. Thus, the entire basis for the Court of Appeals’ position below crumbles.

Georgia that attorneys and insurers cannot ask questions without risking exposing their companies, insureds, and/or clients to uncapped financial liabilities? What would happen if the petitioner’s insurer had run into respondent’s counsel at a ball game and said, “We received your demand. Will you be around tomorrow to answer some questions?” If you follow the logic of the Court of Appeals, simply asking that question would act as a rejection of the demand. The problem with that logic is that whether an inquiry is in writing or verbal is immaterial to a settlement. Simply calling an immaterial term “material” does not make it so.

Under Georgia law, a settlement agreement is a contract, and O.C.G.A. § 9-11-67.1 includes the “essential” terms of a pre-litigation settlement. *Wright v. Nelson*, 358 Ga. App. 871 (2021). For there to be an enforceable contract in Georgia, there simply needs to be an agreement to the “essential” or “material” terms. *Eversbusch v. Eversbusch*, 293 Ga. 60, 61 (2013); *Heights v. Home Depot*, 283 Ga. App. 779, 782 (2007). Unfortunately, the Court of Appeals below, in reliance upon this Court’s decision in the *Grange* case, failed to recognize that there only has to be an agreement to “essential” or “material” terms.³ Under no objective standard of contract interpretation is making or not making a phone call anything but immaterial.

³ The Court of Appeals cited the *Grange* case no less than ten times, demonstrating the need for this Court to clarify that previous holding.

O.C.G.A. § 9-11-67.1 speaks to “material” terms, not immaterial terms. In the *Grange* case, this Court, in answering a certified question specific to the timing of a settlement payment, held that requesting a settlement payment within a specified period was material to the issue of contract formation. *Grange*, 300 Ga. at 850. This Court reached this conclusion based upon the language of O.C.G.A. § 9-11-67.1(g), which specifically states that a party making an offer to settle can request payment within a specified period. Even without the language in subpart (g), this Court likely would have determined that the timing of payment is a “material” or “essential” part of a settlement. The problematic language from the *Grange* case is the portion of the decision in which this Court states that “[g]iven that under common law an offeror is free to set the terms of his or her offer, we read subsection (a) in this fashion, in harmony with the existing law: every Pre-Suit Offer must contain the five enumerated terms, but additional terms are not prohibited.” *Grange*, 300 Ga. at 855.

Since *Grange*, there has been a re-birth of the “gotcha” tactics which existed before the passage of O.C.G.A. § 9-11-67.1. These tactics have been fueled by a literal interpretation of the aforementioned language from the *Grange* case. The GDLA now calls upon this Court to clarify that the phrase “additional terms” from *Grange* meant essential or material additional terms, and not terms only limited by the imagination of an attorney representing a claimant. Clearly, this Court never

intended to depart from already existing common law relating to contract formation. A literal reading of *Grange* leads to unintended consequences in which certain attorneys will draft settlement demands with the inclusion of non-essential conditions for the sole purpose of eliciting alleged counteroffers over acceptances.

VI. CONCLUSION

For the foregoing reasons, the GDLA respectfully requests that this Court grant the petition for writ of certiorari.

This 26th day of August, 2021.

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*On Behalf of the Georgia Defense
Lawyers Association*

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **GEORGIA DEFENSE LAWYERS ASSOCIATION’S AMICUS CURIAE BRIEF IN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** with the Court using the SCED online system and served all parties below by depositing a copy of the same in the United States Postal Service with adequate First Class Mail postage thereon and addressed as follows:

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This 26th day of August, 2021.

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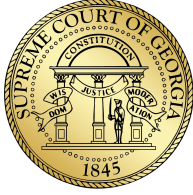
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On Behalf of the Georgia Defense Lawyers Association



SUPREME COURT OF GEORGIA
Case No. S21C1252

August 26, 2021

The Honorable Supreme Court met pursuant to
adjournment.

The following order was passed.

STEPHAN DUWAYNE WHITE v. WALTER CHEEK.

Upon consideration of the Motion to File Brief of Amicus Curiae, it is ordered that the motion is granted and that the movant file the brief attached to the motion.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the
minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto
affixed the day and year last above written.

A handwritten signature in black ink that reads "Thrice A Barnes". The signature is written in a cursive style.

, Clerk