IN THE COURT OF APPEALS

STATE OF GEORGIA

JIMMY BATES and DONNA KAY MARTIN, AS THE ADMINISTRATOR OF THE ESTATE OF DEBORAH E. BATES,	)	
Appellant,	)	
v.	)	Case Number: A22A1460
JUDY SIMMONS,	)	
Appellee.	)	

On Appeal from the State Court of Henry County,
Civil Action File No. STSV2020000162

BRIEF OF APPELLANT

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INTRODUCTION

Over thirty (30) years have passed since the Georgia Supreme Court authored its decision in *Southern General v. Holt*, 262 Ga. 267 (1992), and nearly ten (10) years have passed since the Legislature adopted the initial version of O.C.G.A. 9-11-67.1. Yet, both continue to be used as a trap to ambush citizens of Georgia and their insurers as they attempt to negotiate in good faith, resolve disputes, and promote judicial efficiency by preventing unnecessary litigation.

Many law-abiding laypeople, like the Appellant, have spent nearly three decades being subjected to impossible demand deadlines, complex acceptance requirements, and unreasonable demand terms beyond those typically required of parties to a settlement. The *Holt* opinion, and O.C.G.A. 9-11-67.1, have allowed offerors to use contract terms and the language contained therein, to either (A) impose intentionally vague or immaterial terms, thereby drastically increasing the risk to a given offeree acting in good faith and attempting to comply, or (B) to argue, regardless of whether a reasonable interpretation of the terms was applied, that the acceptance did not comport with the offeror's self-serving interpretation, thereby making the acceptance a rejection and counteroffer.

The latter of the two scenarios described above, as this Brief will show, perfectly mirrors the scenario the Parties have found themselves in in the underlying

case. As set forth in *Grange Mutual Casualty Company v. Woodward*, 300 Ga. 848 (2017), the Georgia Supreme Court, in referring to O.C.G.A. § 9-11-67.1, stated that "the Act was arguably meant to be a compromise between the plaintiff and defense bars and to reduce 'procedural quibbling over the technical sufficiency of a settlement offer.'" *See Woodward*, 300 Ga. 848.

Unfortunately, though, because the Appellees presented an offer of settlement, received an acceptance to the same, but then took the position that said acceptance was actually a rejection and counteroffer because it did not comport with their *unreasonable interpretation of the terms of the offer*, the parties now find themselves in the midst of such "procedural quibbling." *See Id.* The very certainty that O.C.G.A. § 9-11-67.1 was intended to provide has been stripped away. The abuses that ran rampant in the wake of *Holt* have returned, and crucially, are on full display in Appellee's *39-page* Offer of Compromise at issue in the underlying matter.

This Court, however, has the ability to provide clarification on what *Holt* and O.C.G.A. 9-11-67.1 actually require of innocent offerees attempting to resolve matters in good faith. The Court also has the power to set precedent establishing that when an offeror presents an offer purportedly in good faith, but then realizes he/she is displeased with the ultimate financial outcome and applies an unreasonable

interpretation of the terms of the offer, any such interpretation should be construed against the offeror, and a more reasonable, plain interpretation of the terms adopted.

Additionally, it is worth mention that the Legislature, taking notice of these unchecked abuses, amended O.C.G.A. § 9-11-67.1. This new version does not apply to the multitude of offers concerning incidents that occurred prior to July 2021. As a result, an order from this Court is essential to both reduce the risk of prejudice in the instant case, and prevent the prejudices described herein from continuing against others in similarly situated positions to that of the Appellant. For these reasons, the Appellant respectfully requests this Court reverse the trial court's January 20, 2022 order and remand this matter with instructions for the trial court to grant Appellant's Motion to Enforce Settlement.

PART ONE

I. Proceedings Below

The underlying civil action arose out of a motor vehicle accident (hereinafter referred to as the "Incident") that occurred on July 27, 2018, in Henry County, Georgia. (V2-5). Following the Incident, the Appellees sent a pre-suit, time-limited Offer of Compromise pursuant to O.C.G.A. § 9-11-67.1 (hereinafter referred to as the "First Offer") to the Appellant and her purported insurance carriers. (V2-70-108). The material terms of the first Offer were accepted by the Appellant on July

26, 2019, and all required acts were completed through delivery of the required consideration on July 29, 2019 (hereinafter referred to collectively as the "Acceptance"). (V2-118); (V2-119).

The Appellees returned the Acceptance, however, on August 22, 2019, and asserted they were treating the Acceptance as a counteroffer but intended to re-issue the demand in the future, notwithstanding the acceptance. (V2-213). The Appellees accordingly then served their second Offer of Compromise (hereinafter referred to as the "Second Offer") on October 22, 2019. (V2-220).

The Appellees later filed suit in connection with the underlying civil action, on January 23, 2020, in the State Court of Henry County. (V2-5). The Appellant filed her Motion to Enforce Settlement on July 31, 2020. (V2-51). This Motion was denied on January 20, 2022. (V2-458).

Upon receiving the State Court's Order denying the Motion, the Appellant requested the matter be certified for interlocutory appeal. The Appellee then filed a response on January 21, 2022. (V2-466). The Appellant filed her reply on January 26, 2022. (V2-481). This matter was then certified for immediate appeal on January 31, 2022. (V2-487). The Appellant's Application for Appeal was then granted on March 2, 2022, and the case docketed on May 17, 2022, making way for this present Brief.

II. Statement of Material Facts

Following the Incident, on June 20, 2019, the Appellees, by and through their attorney, John Webb, sent the First Offer as a pre-suit, time-limited Offer of Compromise, pursuant to O.C.G.A. § 9-11-67.1, to the Appellant and her purported insurance carriers, Progressive Premier Insurance Company of Illinois (hereinafter referred to as "Progressive") and ACCC Insurance Company (hereinafter referred to as "ACCC"). (V2-70). The First Offer was described as a *contingent* offer of compromise, pursuant to O.C.G.A. § 9-11-67.1 and *Cotton States Mut. Ins. Co. v. Brightman*. 276 Ga. 683 (2003), and provided that the Appellees would only settle if *both* insurers accepted unequivocally and without variance of any kind. *See Id.* Yet, interestingly, the First Offer also demanded a *general release* from both insurers. *See Id.*

The material terms of the First Offer were then accepted by Progressive on July 26, 2019, and all required acts were completed through delivery of the required consideration on July 29, 2019. (V2-118-119). Specifically, the required *general* release, affidavit of no other insurance, and draft for Progressive's $100,000.00 policy limits, were delivered to the Appellee on July 29, 2019, as part of the Acceptance. *See Id.*

Despite unequivocal acceptance and clear compliance with the terms of the

First Offer, including the fact that Progressive and Judy Simmons provided a general release to the Appellees as demanded, Mr. Webb returned the consideration on August 22, 2019, and asserted he was treating the Acceptance as a counteroffer, but nevertheless intended to re-issue it in the future since ACCC *did not receive* it. (V2-213).

The Appellees then served their Second Offer on October 22, 2019, also as a pre-suit, time-limited Offer of Compromise pursuant to O.C.G.A. § 9-11-67.1. (V2-220). The Second Offer was allegedly drafted because ACCC did not receive the First Offer. Importantly though, *the wording addressing the affidavit requirement had changed significantly.* (V2-76, fn. 6; V2-226-228, fn. 6). After examining the same, it is clear the wording was changed not in an effort to provide clarity. *Id.* Rather, the wording was seemingly altered because the Appellees noticed that the First Offer could not be employed as effectively in later arguing that *any potential acceptance* of the same did not comport with *their* interpretation of the terms and thus was a rejection and counteroffer. *See* (V2-70, 76-77; V2-220). In short, the wording included in the Second Offer plainly indicates that that the wording of the First Offer was too definite for the Appellees' intended uses and would prevent them from arguing that any potential acceptance of the same was rejected. *See Id.* They therefore changed the wording. *See Id.*

Moreover, this newly-revised language, rather than being added in a conspicuous fashion to promote clarity and good faith, was instead buried in a footnote. (V2-118-119). However, by this point, the Appellant had already complied with all terms of the First Offer and therefore, an enforceable contract in the underlying case had been formed. *Id.* The Appellees then filed suit on January 23, 2020. *See* (V2-5).

III. Brief Summary of Argument

As will be explained throughout later parts of this Brief, the January 20, 2022 Order entered by the State Court of Henry County denying the Appellant's Motion to Enforce Settlement should be reversed because the Appellant, after being presented with a *seemingly unambiguous* pre-suit, time-limited Offer of Settlement in the underlying matter: (1) accepted the Offer unequivocally, and without variance of any sort, (2) complied with all material terms and performed all required acts, and (3) satisfied all portions of the Offer over which she had control. As such, a valid settlement agreement was created and should be recognized as an enforceable contract by this Court.

The Appellees, as the Plaintiffs to the underlying case, purport that no settlement was created because the release attached to the Acceptance did not conform to the terms of the Offer. As will be shown though, the difference of the

positions taken by the Appellant and the Appellees as to whether they Acceptance was valid results not from ambiguity in the terms of the contract, nor from any disagreement as to what was provided along with the Acceptance.

The difference of positions as to whether the Acceptance was valid instead results directly from the Appellees' *self-created, self-serving, and facially unreasonable interpretation* of the terms of their own First Offer. Because the purported variance from the terms of the agreement was created by the Appellee's interpretation of the First Offer, and *not* by some difference between the plain meaning of the terms of the First Offer and the actions taken by the Appellant, the ambiguity read into the agreement by the Appellees should be construed against them, and a more reasonable, plain interpretation, confirming that the Appellant satisfied all portions of the Offer over which she had control, should be applied. For these reasons, the Appellant respectfully urges this Honorable Court to reverse the January 20, 2022, Order entered by the State Court of Henry County, clarify the requirements which may be imposed upon offerees in similarly situated positions to that of the Appellant, and remand this matter with instructions for the State Court of Henry County to grant the Appellant's Motion to Enforce Settlement.

IV. Preservation of Error

The errors enumerated in this Appeal were preserved by the Appellant by

timely obtaining a Certificate of Immediate Review from the trial court on January 31, 2022, and by filing her Application for Interlocutory Appeal, which was granted by this Court on March 2, 2022. (V2-487). Additionally, Appellant's Notice of Appeal was timely filed, as this appeal was docketed on May 17, 2022.

PART TWO

I. Enumeration of Error

The trial court erred in denying Appellant's Motion to Enforce Settlement because the Appellant (1) accepted the Offer unequivocally, and without variance of any sort, (2) complied with all material terms and performed all required acts, and (3) satisfied all portions of the Offer over which she had control. A valid settlement agreement was formed. Any variance asserted by the Appellees purportedly rendering the Acceptance a rejection and counteroffer stems from their interpretation of the terms of the agreement, and not the plain meaning of the terms of the agreement themselves, and thus should be construed against them in accordance with the doctrine of *Contra Proferentem*.

II. Statement of Jurisdiction

Jurisdiction lies in this Court, and not the Supreme Court, because jurisdiction does not lie solely in the Supreme Court under Ga. Const. Art 6, § 6, ¶ 3 and Ga. Const. Art. 6, § 5, ¶ 3. This appeal is allowed by O.C.G.A. § 5-6-34(b) and Court of

Appeals Rule 30. The Application for this Appeal was filed within ten (10) days of the trial court's certification and grant of immediate review, entered on January 31, 2022. (V2-487). The Appellant's Application for Appeal was then granted on March 2, 2022, and the Appeal docketed on May 17, 2022.

PART THREE

I. Standard of Review

This Court applies a *de novo* standard of review to a trial court's order on a motion to enforce a settlement agreement. *Newton v. Ragland*, 325 Ga. App. 371 (2013). Overall, Georgia appellate courts have long upheld the authority of trial courts to enforce settlement agreements. *Id* at 373 ("The law favors compromise, and when parties have entered into a definite, certain, and unambiguous agreement to settle, it should be enforced."); *citing Greenwald v. Kersh*, 257 Ga. App. 724, 726 (2005); *see also Turner v. Williamson*, 321 Ga. App. 209 (2013). The compromise of a doubtful claim is upheld as a matter of public policy to prevent excess and unneeded litigation. *Tillman v. Mejabi*, 331 Ga. App. 415, 417 (2016).

II. ARGUMENT AND CITATION TO AUTHORITY

The State Court of Henry County's January 20, 2022, Order denying the Appellant's Motion to Enforce Settlement should be reversed because the Appellant, after being presented with a pre-suit, time-limited Offer of Settlement pursuant to

O.C.G.A. §9-11-67.1: (1) accepted the same unequivocally and without variance of any sort, (2) complied with all material terms and required acts, and (3) satisfied all portions of the Offer over which she had control. A valid settlement agreement was created at the time the Appellant delivered the Acceptance and complied with all required acts. As a result, the First Offer, combined with the Acceptance and consideration delivered therewith, should be recognized as an enforceable contract.

The Appellees will likely contend that no settlement was created because the release attached to the Appellant's acceptance did not conform to the terms of the First Offer. As will be shown though, the difference in the positions of the Appellant and the Appellees as to whether the Acceptance was valid results not from ambiguity of a reasonable interpretation of the terms of the contract, but rather from the Appellees' *self-created* and *self-serving* interpretation of the terms of their own First Offer. Because the purported variance was *created* by the Appellee's interpretation and did *not* arise out of a difference between the plain meaning of the terms and the actions taken by the Appellant, an enforceable settlement agreement exists.

Furthermore, it is worth a discussion of the fact that much of the "procedural quibbling" contemplated by the Legislature when drafting O.C.G.A. § 9-11-67.1, and that which has been considered by this Court in drafting various decisions on this issue, is *caused* by the abuse of the terms of O.C.G.A. § 9-11-67.1, which is

employed to craft demands like the First Offer in the case at bar. *See Woodward*, 300 Ga. 848. Specifically, because subsection (a) of the version of O.C.G.A. § 9-11-67.1 at issue in this case provides what terms *must* be included, but does not provide that potential offerees may accept the offer through accepting the terms listed, offerors are free to craft offers with as many, and as diverse of terms as they wish, regardless of whether they are fair or reasonable. Further, subsection (c) seems to support this proposition, as it essentially completely removes the requirements subsection (a) seemingly attempted to impose.

Offers of the type described above, to include the First Offer in the underlying case, include *some material terms* which, in the interest of good faith, are bolded, underlined, and otherwise *designed to be conspicuous*. These types of offers also, however, include other terms deemed *material terms*, which are not clearly identified and are instead placed deep within a footnote, far from the front page, and most importantly, are written with specific wording to allow for later, self-serving interpretations of the meaning of those words. In short, these offers appear as good faith offers, but instead are actually designed to with the singular goal of manufacturing extra-contractual claims.

Fortunately, though, the Appellant does not purport to be the only one to have recognized and objected to these abuses. In fact, the Legislature has already amended

O.C.G.A. § 9-11-67.1. This new version largely solves the issues described above, as it provides that an offer pursuant to the statute may be accepted through accepting the material terms *deemed material by the statute*. *See* O.C.G.A. § 9-11-67.1 (2021). It does not apply to the multitude of offers concerning incidents that occurred prior to July of 2021, however, making an order from this Court essential to both reduce the risk of prejudice in the instant case and to prevent the prejudices described herein from continuing in other matters.

This Court has also heard argument over these issues previously and has emphasized some of the abuses described. *See Wright v. Nelson*, 358 Ga. App. 871, 876-77 (2021) (McFadden, J., concurring): "It has become clear that, to a plaintiff whose injuries greatly exceed the available coverage, a policy-limits settlement can be less valuable than a rejected offer and consequent bad-faith claim – however dubious the claim. In the context of proceedings to enforce purported settlements, *plaintiffs sometimes structure offers not to reach settlements, but rather to elicit rejections*." (emphasis supplied).

Further, in the *Wright* concurrence, this Court also recognized "the ongoing efforts of the courts and the General Assembly to address the unintended consequences of our Supreme Court's decision in *Southern Gen. Ins. Co. v. Holt,* 262 Ga. 267, 416 S.E. 2d 274 (1992)." *Wright*, 358 Ga. App. at 876-77. The

concurrence further stated that this Court "implicitly disavows *any intent* to enable a plaintiff's attorney to set up an insurer." *See Id*. The concurrence in *Wright* highlights key issues with the *Holt* decision that are ongoing and present in the underlying case, and this Court's disapproval of the same. *See Id.*

This Court also examined these issues in *White v. Cheek*. 360 Ga. App. 557 (2021). Judge McFadden again raised the unintended consequences of *Holt* and noted the ruling "creates an incentive, in cases where damages greatly exceed policy limits, for a plaintiff to attempt to set up a bad faith claim." *Id* at 564. Judge McFadden also highlighted the "onerous requirements made of the insurer in Cheek's offer letter" and voiced "grave concerns about the contents of the offer letter." *Id.*

The abuses identified by the above decisions, specifically the use of tricky form letters to trap unsuspecting offerees and their insurers, are the same issues and abuses present in the underlying case. As stated by Judge McFadden, "The 22-page offer letter is compelling, if not dispositive, evidence of a lack of intent to settle the claim and so of bad faith. Per force it is not bad faith to reject an offer made in bad faith." *Id* at 567.

Luckily, the actions described above, most of which have certainly been exhibited by the Appellees, have already been addressed by the Legislature and

Georgia appellate courts, through the doctrine of *Contra Proferentem*. As such, the Appellant respectfully urges this Honorable Court to hear this interlocutory appeal, consider the authority presented hereinafter, reverse the trial court's January 20, 2022, Order, and remand with instructions for the trial court to grant the Appellant's Motion to Enforce Settlement.

i. The Trial Court's January 20, 2022, Order Should Be Reversed Because The Appellant Accepted The Appellee's Offer Of Settlement Unequivocally And Without Variance Of Any Sort, And Thereby Created A Valid And Enforceable Settlement Agreement In The Underlying Case.

The trial court's January 20, 2022, Order should be reversed because the Appellant, after being presented with a *seemingly unambiguous* pre-suit, time-limited Offer of Settlement pursuant to O.C.G.A. § 9-11-67.1, (1) accepted the Offer unequivocally, and without variance of any sort, (2) complied with all material terms and performed all required acts, and (3) satisfied all portions of the Offer over which she had control, thereby creating a valid settlement agreement.

The First Offer served upon the Appellant's insurers by the Appellees contained specific material terms which were to be met "to form a binding settlement contract." (V2-91-95). It also required certain acts be completed as part of the terms. *See Id*. Finally, the First Offer was also described as a contingent offer of compromise pursuant to O.C.G.A. § 9-11-67.1 and *Cotton States Mut. Ins. Co. v.*

Brightman. 276 Ga. 683 (2003). *See* (V2-70, 72).

A contract was formed when the Appellant notified the Appellees that "Pursuant to O.C.G.A. § 9-11-67.1(b), Progressive accepts the material terms of the Offer of Compromise in their entirety and tenders its applicable bodily injury limit in the amount of $100,000.00." on July 26, 2019, and then performed all required acts on July 29, 2019. (V2-118-119). At this point, there was an offer, as evidenced by the First Offer; there was an acceptance, as evidenced by the Acceptance; and there was consideration, as both parties were to either act and/or forego some rights in connection with the agreement. *See* (V2-70-108; V2-118-119). Thus, a contract was formed upon the delivery of the Acceptance and performance of all required acts. *See* O.C.G.A. § 13-3-1; *See also* (V2-118-119).

The Appellees purport that no agreement was created, and that the Acceptance was merely a rejection and counteroffer because the Acceptance allegedly did not comport to the Appellees' *self-created, self-serving, and unreasonable interpretation* of what the First Offer required. This position is baseless, however, because the Appellant accepted all material terms of the First Offer in their entirety and communicated the same unequivocally and without variance of any sort. At the point when the Acceptance was delivered, on July 29, 2019, all elements of formation a contract had been satisfied, and an enforceable agreement was in place.

See (V2-70-108; V2-118-119); *see also Imaging Systems International, Inc. v. Magnetic Resonance Plus, Inc.* 241 Ga. App. 762 (2000): ("Georgia courts have repeatedly stated that "where terms used in the contract are plain and unambiguous, the language must be afforded its literal meaning, and plain ordinary words given their usual, plain, ordinary, common and popular sense.").

The Appellant also complied with all required acts identified as terms of acceptance by the First Offer. In particular, but in short form, the First Offer demanded the following the Appellant and her insurer:

l. payment in the amount of $100,000.00;

2. the execution by Judy Simmons of an affidavit of no other insurance coverage; and

3. a general release of Judy Simmons, only, from "all claims of Jimmy Bates for the wrongful death of Deborah Bates and all claims of Donna Kay Martin as the Administrator of the Estate of Deborah E. Bates."

(V2-91-95).

After receiving the First Offer, the Appellant accepted the terms, as shown by her letter of Acceptance. (V2-118). She then delivered her Acceptance, along with all items required. (V2-119). Ultimately, it is undisputed that the Appellees timely received (1) payment in the amount demanded, (2) the signed and notarized

Affidavit, and (3) a compliant release that was limited to the correct released party and the correct claims. Yet still, the Appellees contend that no settlement was formed, and primarily point to three purported variances that allegedly existed between the requirements of the First Offer and the Acceptance.

First, the Appellees contend that because the affidavit of no additional insurance, though timely executed and delivered, was not expressly *mentioned* within the General Release, the same failed to meet a term allegedly required by the Offer. (V2-443). The Appellees do not dispute though, that the First Offer stated as follows:

> [If] you include any language in the release you send to us that directly or indirectly attempts to exclude the sworn and notarized statement that there is no other insurance from comprising part of the consideration for this offer of compromise, it will constitute a counteroffer and rejection and result in the immediate, automatic, and permanent withdrawal of this offer of compromise.

(V2-94, fn. 20).

The Appellees then argue, with regard to the general release, that (2) "Progressive's Release [sent] with the purported acceptance only mentioned the settlement sum and failed to include the affidavit as part of the consideration," and therefore, functioned as a rejection and counteroffer. (V2-443).

However, it appears the Appellees are confusing the difference between an offer which mandates the *inclusion of a term*, versus another offer that simply

prohibits the exclusion of that same term. In short, an offer stating that a release cannot include certain language, like the First Offer, and another offer stating that language opposite to that certain language must be included (like the *Second Offer did*, interestingly) are not the same offer.

Certainly, in applying a *reasonable interpretation* to the above excerpt from the First Offer, it is clear only that the First Offer disallowed "language in the release … that directly or indirectly attempts to exclude the sworn and notarized statement that there is no other insurance from comprising part of the consideration." *See* (V2-94, fn. 20). The First Offer *did not* mandate that the term 'affidavit of no additional insurance' be included. *See Imaging Systems International, Inc.,* 241 Ga. App. at 762; *see also* (V2-94, fn. 20).

The First Offer did, on the other hand, warn and threaten that any included language not contemplated by it would render an acceptance a rejection and counteroffer. *See* (V2-76-108). These two clauses, considered together, unquestionably indicate that the drafter of the First Offer knew there was unequal bargaining power during the negotiations, and took advantage of that bargaining power by providing an offer with terms that, based on separate, subjective, and *self-serving* interpretations, could be argued to mean different things. Further, the phrasing shows that the First Offer was designed not as a means of potentially

resolving the case, but as a trap used in pursuit of a bad faith claim against the Appellant's insurer. **Nevertheless, the first Offer clearly did not, to any extent, expressly require that specific language mentioning the affidavit of no additional insurance be included in the release.** As such, notwithstanding the unreasonableness of the Appellees' interpretation of their own offer, this purported material term was complied with under any reasonable interpretation of the same, thereby forming a valid settlement agreement.

It is also worth discussing the Second Offer served upon the Appellant and her insurers in the underlying matter, even though the same is not required for the Court to find that an enforceable settlement agreement was formed, given the Acceptance of the First Offer.

After Appellees' counsel viewed and returned the Acceptance on August 22, 2019, he sent another Offer of Compromise on October 22, 2019. *See* (V2-220-260). The Second Offer was *almost* identical to the first, but notably, included the following altered language:

> If the release you send to us excludes or **omits** or attempts to exclude or **omit** the sworn and notarized statement that there is no other insurance from comprising part of the consideration for this offer of compromise, it will constitute a counteroffer and rejection and will result in the immediate, automatic, and permanent withdrawal of this offer of compromise. Please be aware that we have done everything reasonable to warn you that the release **must include language** stating that the sworn and notarized statement that there is no other insurance is part of the consideration for the release or it will

> constitute a counteroffer and rejection and will result in the immediate, automatic, and permanent withdrawal of this offer of compromise.

(V2-245-246, fn. 20).

The above language of the Second Offer, and especially the fact that said language was added in between the Appellees' sending of the First Offer and their sending of the Second Offer, beg the question: **If the footnote at issue in the First Offer was as clear and was not subject to varying interpretations as alleged by the Appellees, why did they alter the language of the Second Offer and bury it in a footnote?** (V2-245-246, fn. 20).

It can only be reasoned that the First Offer did not require the Release to include language actually stating that the affidavit of no additional insurance was part of the consideration. Instead, it merely mandated that no language *excluding* the affidavit of no additional insurance as part of the consideration could be included. This newly added language also, like other terms deemed *material* by the Appellees, was buried deep within a footnote of the Second Offer. (V2-245-246, fn. 20). Nevertheless, the only requirements of the first Offer were that the affidavit not be *excluded* as consideration, *which it was not*, and that the affidavit be delivered along with the payment, *which it was*.

The second variance between the requirements of the First Offer and the Acceptance asserted by the Appellees is that the Appellant's General Release

included an "un-offered representation from a notary." *See* (V2-213; V2-443). Unsurprisingly, this alleged variance is also based solely upon a self-serving and unreasonable interpretation of the terms of the First Offer, and the agreement created upon the Appellant's delivery of the Acceptance.

Specifically, the First Offer provided that the Release could not include "representations by anyone not specifically listed in the offer" and further stated that if a release including the same were returned, it would be deemed a rejection and counteroffer. (V2-94-98). But similar to the above, whether or not this term was complied with fully depends on the interpretation applied to the contract which, again, could either be a reasonable one, or the unreasonable, self-serving one supported by the Appellees, who possessed significantly greater bargaining power. *See Imaging Systems International, Inc.,* 241 Ga. App. 762 (2000): ("Georgia courts have repeatedly stated that "where terms used in the contract are plain and unambiguous, the language must be afforded its literal meaning, and plain ordinary words given their usual, plain, ordinary, common and popular sense.").

In examining the language of the First Offer, it is clear it mandated that no "*representations*" other than that of the Releasor, be required. According to *Black's Law Dictionary,* a representation is "A presentation of fact — either by words or by conduct — made to induce someone to act, esp. to enter into a contract."

'Representation Definition,' *Black's Law Dictionary* (11th ed. 2019). By this definition, a representation would include only statements *of fact* which are made in order to induce another to do something.

What the above definition does not include, however, are mere statements of confirmation or authentication which are not suggestions of fact and are not made to induce another, but which merely verify and validate representations already made by another. Because a reasonable reading of the above definition and a reasonable interpretation of the settlement agreement created in the underlying case, together, could not be reasonably determined to require the exclusion of a notarization, it is clear that this term was also still complied with, thereby creating a valid contract.

The third purported variance asserted by the Appellees is that the Release included with the Acceptance purportedly proposed an "un-offered representation" that the Appellees were executing the release as their own "free act and deed." (V2-213; V2-443). However, like the above, the First Offer did not expressly exclude this notation either. Instead, the First Offer sought to exclude additional 'representations,' which, reasonably, does not include mere statements of validation and confirmation of representations made by others for the purposes of ensuring assent and compliance with Georgia Contract Law. *See* 'Representation Definition,' *Black's Law Dictionary; See also* O.C.G.A. § 13-5-6: ("Since the free assent of the

parties is essential to a valid contract, duress…by which the free will of the party is restrained and his consent induced, renders the contract voidable.").

It truly defies logic to claim that there is no meeting of the minds *because* language stating the agreement was made as a "free act and deed" is present in the documents constituting the agreement. It is also undisputed that nowhere in the First Offer was any express statement that the inclusion of a notary's notation box was prohibited. Thus, the Appellant complied with this term of the First Offer as well.

Considering the three purported variances discussed above, and the arguments made by the Appellees in connection with the same, it is evident that the First Offer was undoubtedly drafted to allow the Appellees to argue, regardless of how the Appellant responded, that the Offer was rejected, and that the door for a bad faith claim against the Appellant's insurer was opened. Mr. Webb never intended to settle this claim, a point made clear by the language of both offers at issue, his response to the Acceptance, and the degree to which the wording of the first Offer was changed in the Second Offer. *See* (V2-70-108; V2-118-119).

The Appellees assert that the Acceptance was a rejection and counteroffer because it failed to expressly mention a phrase that was allegedly required by the First Offer, despite the fact that it only stated that any language which "directly or indirectly attempts to exclude" consideration was to be omitted. *See* (V2-91-95).

They further assert that the Acceptance was a rejection and counteroffer because it provided for the notation and recognition of free will from a notary. The First Offer though, only excluded further "representations." (V2-94-98).

The Appellees are likely to submit precedent showing a laundry list of variances that have been recognized by this Court in the past as actual variances between offers and acceptances in those various cases. However, these cases can all be distinguished from the case at bar because the terms of the First Offer (1) were subject to a plain meaning and (2) were fully complied with, pursuant to the plain meaning. *See Imaging Systems International, Inc.,* 241 Ga. App. 762 (2000). Because no actual variance, material or immaterial, can be shown in connection with this matter, said precedent authority is uninstructive. Instead, a plain, reasonable interpretation of the terms of the First Offer can be applied here to confirm the creation of the valid settlement agreement.

Wording of the type used in the First Offer puts offerees in an impossible position and was designed to do so. On one hand, an offeree must respond, and must comply in order to prevent further litigation. *See Id*. On the other hand, an offeree is also charged with evaluating precisely what language can and cannot be included, to then *be judged by the offeror* amidst constant threats regarding the seeking of guidance or clarification pertaining to certain provisions. *See Id* at pp. 7-8, footnote

6. This language, and all other language from the First Offer, demonstrates that the Appellees intentionally drafted a demand that would allow them to argue that an Acceptance did not occur, regardless of how the Appellant actually responded. Nevertheless, all terms were still complied with, and a valid settlement agreement was created.

Because all terms of the First Offer were met unequivocally and without variance, not only is reversal of the trial court's January 20, 2022, Order warranted on this Appeal, but so is clarification on what may be required of offerees, and how terms may be used by offerors, in connection with offers of settlement served pursuant to O.C.G.A. § 9-11-67.1.

ii. <u>Because The Alleged Variance Between The First Offer And The Acceptance Arose From The Appellees' Unreasonable Interpretation Of The Terms Of The First Offer, And *Not* By Some Difference Between The Plain Meaning Of Those Terms And The Acceptance, The Ambiguity Read Into The Agreement By The Appellees Should Be Construed Against Them And A Valid, Enforceable Settlement Agreement Recognized In The Underlying Case.</u>

As shown hereinabove, the Appellant, after receiving a pre-suit, time-limited Offer of Settlement pursuant to O.C.G.A. §9-11-67.1 in the underlying case: (1) accepted the same unequivocally and without variance of any sort, (2) complied with all material terms and required acts, and (3) satisfied all portions of the Offer over which she had control, thereby creating a valid settlement agreement at that time the

Appellant delivered the Acceptance. However, notwithstanding the above, the Appellees purport that no settlement was created because the release attached to the Acceptance allegedly did not conform to the terms of the First Offer.

As will be shown in this section though, the terms of the First Offer were not ambiguous. (V2-91-95). In fact, a plain meaning of the relevant terms, included above, clearly shows what the First Offer required. *See Id; See also Imaging Systems International, Inc.*, 241 Ga. App. 762 (2000). It also included footnotes from the Appellees explaining the amount of time and effort that had been put into the First Offer in order to author the same with it being free from errors or other issues which could render it confusing or ambiguous, confirming that the Appellees would likely agree the First Offer was unambiguous. *See Id* at pp. 19, footnote 16. Moreover, the Appellees would likely not dispute that they had control over what terms were placed therein: "the offeror is the master of the offer." *See* (V2-74-76)

It is therefore quite perplexing that despite the lack of ambiguity in the First Offer, and despite that the unambiguous terms were fully complied with, the Appellees now contend that First Offer was not accepted. They assert in connection with that position that the Acceptance "excluded" certain parts of the consideration from the settlement, and "include[ed] an un-offered term," even though those items, based upon a reasonable interpretation of the First Offer, were not mandated anyway.

(V2-443; V2-91-95, fn. 20; V2-245-246, fn. 20); *Imaging Systems International, Inc.*, 241 Ga. App. 762 (2000). In short, the Appellees presented an unambiguous offer to the Appellant, received the unambiguous Acceptance in response, but now posit that the Appellants failed to comply with the terms of the First Offer *as the Appellees have interpreted them*.

Certainly, according to the definitions contained within Black's Law Dictionary and a plain reading of the terms included in the First Offer, it is evident that the Plaintiff's interpretation of the terms of the First Offer is unreasonable. *Imaging Systems International, Inc.*, 241 Ga. App. 762 (2000). It is also clear that the Appellees chose to use the purportedly varying interpretations of the wording of the First Offer to their advantage, and to argue that the Acceptance was actually a rejection and counteroffer regardless of what the Acceptance actually comprised of. *See* (V2-91-95, fn. 20; V2-245-246, fn. 20). Thus, it is ultimately undisputed that the Appellees (1) had full control over the drafting of the Offer, (2) possessed visibly greater bargaining power by having the same, and (3) by their own admission, wrote an offer that required no further clarification. The Appellees then, following the Appellant's Acceptance, chose to craft an adopt a non-plain, varying interpretation of the terms of the First Offer, thereby providing them with the argument that the Acceptance was actually a rejection and counteroffer.

Fortuitously though, the actions described above, which have been exhibited by the Appellees in the underlying case, have already been addressed by the Legislature and Georgia appellate courts, through the doctrine of *Contra Proferentem*.

Preliminarily, under Georgia Law, "courts have repeatedly stated that "where terms used in the contract are plain and unambiguous, the language must be afforded its literal meaning, and plain ordinary words given their usual, plain, ordinary, common and popular sense." *Imaging Systems International, Inc.*, 241 Ga. App. 762 (2000). On the other hand, where the construction or terms of a contract are ambiguous, they are to be construed against the party undertaking the obligation, i.e., the drafter. *See* O.C.G.A. § 13-2-2(5). Further, the Georgia Supreme Court has examined the issue, and held that "[i]t is well settled that 'where construction of a contract is doubtful, it is to be construed most strongly against the party who prepared it.'" *Kennedy v. Brand Banking Co.*, 245 Ga. 496, 500 (1980); *citing Baker Mtg. Corp. v. Hugenberg*, 145 Ga.App. 528 (1978); *see also National City Bank of Rome v. Busbin*, 175 Ga. App. 103 (1985); *Pounds v. Hospital Authority of Gwinnett County*, 191 Ga. App. 689 (1989).

This Court has also examined the issue and ruled that "any ambiguity must be construed most strongly against the drafter of the contract." *McDuffie v. Argroves*,

230 Ga. App. 723, 725 (1998); *see also Promenade Associates, Ltd. v. Finish Line, Inc.*, 194 Ga. App. 741, 742 (1990): ("Corollary rules of construction acknowledged in Georgia require construction … against the party drafting the agreement."); *citing Farm Supply Co. of Albany v. Cook,* 116 Ga. App. 814 (1967).

Finally, regarding how to approach matters involving purportedly varying interpretations of terms of an agreement, the Court held that "[u]nder the statutory rules of contract construction, if a contract is capable of being construed two ways, it will be construed against the preparer and in favor of the non-preparer" *Envision Painting, LLC v. Evans*, 336 Ga. App. 635 (2016).

In applying these decisions to the case at bar, it is worth examining the specific language the Appellees assert as that which purportedly led caused the Acceptance to be a rejection and counteroffer. Particularly, as discussed above, the Appellee admits that the First Offer provided that: "any language in the release you send to us that directly or indirectly attempts to exclude the sworn and notarized statement . . . will constitute a counteroffer and rejection[.]" (V2-91-95, fn. 20; V2-443).

The Appellee then also contends, with regard to the general release delivered as part of the Acceptance, that because the same did not include a verbatim reference to the 'affidavit of no additional insurance,' it functioned as a rejection and counteroffer. (V2-443). However, that is simply *not what the wording requires*, as

illustrated above. Instead, the Appellees, in attempting to allege a variance on that front, confuse the difference between an offer which mandates the *inclusion of a term*, versus another offer that simply *prohibits the exclusion of that same term*.

Because this alleged variance results from the Appellees' unreasonable interpretation of the terms of the First Offer and *not* from some difference between the plain meaning of those terms and the Acceptance, the ambiguity read into the agreement by the Appellees should be construed against them.

Furthermore, with regard to the other two alleged variances, the Appellees assert that the general release delivered with the Acceptance included "un-offered representation[s] from a notary." (V2-443). Yet, the First Offer simply stated the Release could not include "representations by anyone not specifically listed in the offer" and stated that if a release including the same were returned, it would be deemed a rejection and counteroffer. (V2-94-98). Mere statements of confirmation or authentication, however, are not included under a reasonable interpretation of the definition of "representations." It is also wholly illogical to submit that there is no meeting of the minds because language stating the agreement was made as a "free act and deed" is present in the documents constituting the agreement.

Because the Acceptance fully complied with all terms of the First Offer under a plain and reasonable interpretation of the same, a valid settlement agreement was

created in the underlying case. On the other hand, because the Appellees allege that the Acceptance did not comply with all terms and offer in support of that proposition a *self-created, self-serving, and facially unreasonable interpretation* of the terms of their own First Offer, their interpretation of the same should be construed against them pursuant to the doctrine of *Contra Proferentem*, and a valid settlement agreement recognized in the underlying case.

iii. The Settlement Agreement In The Underlying Case Should Be Enforced Because The Appellant Satisfied All Terms Of The Offer Of Settlement Over Which She Had Control.

The Appellees also assert, as the fourth alleged variance between the First Offer and the Acceptance, that the offer was rejected because ACCC, the Appellant's secondary insurer, did not comply with the terms of the First Offer directed towards it and Progressive. This contention is also without merit, however, given the controlling case law.

In *Cotton States Mutual Ins. Co. v. Brightman*, 276 Ga. 683 (2003), the Georgia Supreme Court considered whether an insurer is liable for bad faith or negligent failure to settle after failing to tender its policy limits because of a demand containing a condition beyond the insurer's control. The Court held that such a failure *may* expose the insurer to liability. *See Id* at 683. However, the Court also concluded that:

> [A]n insurance company faced with a demand involving multiple insurers can create a *safe harbor* from liability for an insured's bad faith claim under Holt by meeting the portion of the demand over which it has control, thus *doing what it can* to **effectuate the settlement** of the claims against its insured.

276 Ga. at 686; *citing Southern General Ins. Co. v. Holt*, 262 Ga. 267 (1992); (emphasis supplied). *Brightman* involved *two joint tortfeasors* insured separately by different insurers, with each acceptance contingent upon acceptance by the other. 276 Ga. at 684.

It cannot be disputed that the Appellant did everything within her control to effectuate the settlement. As such, she and Progressive have undoubtedly created a safe harbor by meeting the portion of the demand over which they had control, and by complying with all terms. The Appellees even included, as demanded, a *General Release* of Judy Simmons.

Thus, by its own terms, the First Offer extinguishes any claim that it was contingent upon acceptance by both carriers. How can an offeror execute two separate General Releases of the same person, for the same claims? **They cannot**. The offerors were free to limit each release to a specific insurance policy, or to demand a limited liability release from each insurer. They did not. When Progressive met their portion of the First Offer and provided the General Release, a contract was formed and all claims against the Appellant were resolved. The only way for this Court to preserve *Brightman* is to find that in the underlying case, a binding and

enforceable settlement occurred when the Appellant met all terms of the First Offer within her control, including providing a *general release* that foreclosed all other claims against the Appellant.

CONCLUSION

In the underlying case, the Appellant received a pre-suit offer of settlement pursuant to O.C.G.A. § 9-11-67.1 and then (1) accepted the same unequivocally and without variance, (2) complied with all material terms and performed all required acts, and (3) satisfied all portions of the Offer over which she had control, thereby creating a valid settlement agreement. The Appellees, however, purport that no settlement was created and allege in connection with this argument that there were variances between the terms of the First Offer and the Appellant's Acceptance.

As shown herein though, the variances alleged by the Appellees result from their own *self-created, self-serving, and unreasonable* interpretation of the terms of their First Offer, rather than from an actual difference between the plain meaning of the terms and the actions taken by the Appellant. Thus, the doctrine of *Contra Proferentem* should control, and the Appellees' interpretation construed against them, thereby affirming The valid settlement agreement. In short, an offer of settlement should be *an offer of settlement*, rather than a trap to be navigated by

unsuspecting, innocent offerees.

WHEREFORE, the Appellant hereby respectfully urges this Honorable Court to (1) reverse the trial court's January 20, 2022 Order, (2) issue a ruling establishing that when offers served pursuant to O.C.G.A. § 9-11-67.1 are weaponized and interpreted in self-serving, unreasonable manners, said interpretations will be construed against the drafters, and (3) remand this matter with instructions for the State Court of Henry County to Grant the Appellant's Motion to Enforce Settlement.

[*Signatures on next page*]

Respectfully submitted,

DOWNEY & CLEVELAND, LLP

Ga. Ct. App. R. 24(f) Certification:
This submission does not exceed the word count limit imposed by Rule 24.

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IN THE GEORGIA COURT OF APPEALS

STATE OF GEORGIA

JIMMY BATES and DONNA KAY MARTIN, AS THE ADMINISTRATOR OF THE ESTATE OF DEBORAH E. BATES,	)	
Plaintiffs,	)	Case Number: _____
v.	)	
JUDY SIMMONS,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following counsel of record with a true and correct copy of the foregoing by depositing the same in the United States Mail with sufficient postage thereon to ensure delivery, properly addressed as follows:

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This 6th day of June, 2022.

[*Signature on next page*]

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