IN THE COURT OF APPEALS
STATE OF GEORGIA

JIMMY BATES and DONNA KAY MARTIN, AS THE ADMINISTRATOR OF THE ESTATE OF DEBORAH E. BATES,	)	Case No. A22A1460
Plaintiffs-Appellees,	)	
v.	)	
JUDY SIMMONS,	)	
Defendant-Appellant.	)	

APPELLEES' RESPONSE BRIEF

Ben C. Brodhead, Esq.
Georgia Bar No. 084127
Ashley B. Fournet, Esq.
Georgia Bar No. 271540
Michael Arndt, Esq.
Georgia Bar No. 836284

BRODHEAD LAW, LLC
3350 Riverwood Parkway, Suite 2230
Atlanta, Georgia 30339
(404) 846-0100
Attorneys for Plaintiffs-Appellees

The only issue before this Court is contract formation, and no contract formed. Across three centuries, the Georgia Supreme Court has held that, to form a contract, an acceptance of an offer must be ***unequivocal, unconditional, identical, and without a variance of any sort***.[1] This same standard applies to formation of settlement contracts, including offers like this one under O.C.G.A. § 9-11-67.1.[2] Thus, to prevail, Appellant Simmons must show an unequivocal and identical acceptance of Appellees' offer without any variance. The trial court correctly held that Appellant Simmons cannot meet this burden because her insurer's response was not identical to the terms of the offer. Accordingly, no contract formed, and the trial court must be affirmed.

---

[1] *See, e.g.*, *Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848, 852 (2017); *McReynolds v. Krebs*, 290 Ga. 850, 853 (2012); *Frickey v. Jones*, 280 Ga. 573, 574 (2006); *Atkinson v. Cook*, 271 Ga. 57 (1999); *20/20 Vision Ctr., Inc. v. Hudgens*, 256 Ga. 129, 133 (1986); *Weldon v. Lashley*, 214 Ga. 99, 102 (1958); *Associated Mutuals v. Pope Lumber Co.*, 200 Ga. 487, 495 (1946); *Eaton v. Harwood*, 198 Ga. 240, 243 (1944); *Milner Hotels of Georgia v. Black*, 196 Ga. 686 (1943); *Fraser v. Jarrett*, 153 Ga. 441 (1922); *Whelchel v. Waters*, 152 Ga. 614 (1922); *Gray v. Lynn*, 139 Ga. 294, (1913); *George W. Mueller Mfg. Co. v. Benton*, 137 Ga. 411(1912); *Larned v. Wentworth*, 114 Ga. 208 (1901); *Robinson v. Weller*, 81 Ga. 704 (1888).

[2] *Bennett v. Novas,* No. A22A0361, 2022 WL 2186435 (Ga. Ct. App. June 17, 2022); *Ligon v. Hu*, 870 S.E.2d 802, 804 (Ga. Ct. App. 2022); *de Paz v. de Pineda*, 361 Ga. App. 293, 298 (2021), *cert. denied* (Mar. 22, 2022); *White v. Cheek*, 360 Ga. App. 557, 563 (2021), *reconsid. denied* (July 12, 2021), *cert. denied* (Feb. 1, 2022); *Wright v. Nelson*, 358 Ga. App. 871, 875 (2021), *cert. denied* (Aug. 10, 2021); *Jervis v. Amos*, 358 Ga. App. 589, 595 (2021), *reconsid. denied* (Feb. 26, 2021), *cert. denied* (July 20, 2021); *Claxton v. Adams*, 357 Ga. App. 762, 769 (2020), *reconsid. denied* (Nov. 17, 2020), *cert. denied* (June 21, 2021); *Pritchard v. Mendoza*, 357 Ga. App. 283, 288 (2020); *Barnes v. Martin-Price*, 353 Ga. App. 621, 626 (2020); *Yim v. Carr*, 349 Ga. App. 892, 905 (2019); *Duenas v. Cook*, 347 Ga. App. 436, 442 (2018).

I. PART ONE: DISPUTED FACTS.

Despite the claims of Appellant Simmons, she did not accept Appellees' first offer to settle and compromise claims relating to the subject collision ("Offer"). (V2-70-117). In fact, the Offer was not even issued to her; it was issued to her insurer, Progressive Premier Insurance Company of Illinois ("Progressive"). (V2-70). Appellant Simmons was not the offeror. She was not the offeree. Appellant Simmons, at most, would have been a beneficiary of the contract if a contract had formed. However, since no contract formed, Appellant Simmons is nothing more than a stranger to failed negotiations between Appellees and Progressive.

As shown below, Progressive rejected the Offer by sending a response that varied from the terms of the Offer. (V2-119-123). Although Appellees later sent a second offer ("Second Offer"), it also was rejected by Progressive. Since all parties acknowledge that the Second Offer was never accepted, the details of the Second Offer and the subsequent counteroffer(s) by Progressive are not relevant to any issue here.

As a requirement to accept Appellees' first Offer, Progressive was required to perform the act of providing a release that fully complied with the requirements of the Offer. (V2-96). Progressive rejected the Offer by failing to deliver a release that complied. (V2-122-123). The following requirements of the Offer were rejected with

the following non-identical responses from Progressive:

(A) The collision between Deborah Bates and Appellant Simmons was not an "accident." Insurers often try to include language in the release that denies liability or refuses to admit liability. This is done so that, in related actions (such as claims for underinsured motorist coverage), the release can be used to show that the claimant acknowledged the tort was merely an "accident" and that there was no admission of fault or liability when the release was signed. Since Appellant Simmons' negligence and recklessness unquestionably caused the subject collision, Appellees did not want to give any concession whatsoever about liability. Appellees' Offer stated "[o]bviously, under the circumstances of this case, Ms. Simmons has liability." (V2-105). The Offer then specifically provided that "[i]f Progressive requires or even requests additional representations or expressions of understanding or agreement relating to denials of liability or non-admissions of liability, it will constitute a counteroffer and will result in the immediate, automatic, and permanent withdrawal of this offer of compromise." *Id.*

As opposed to accepting the Offer, Progressive rejected the Offer by requiring Appellees to sign a release characterizing the collision as an "accident." Specifically, Progressive added language in the release stating that Deborah Bates' "injury and death [were] the result of a motor vehicle ***accident***." (V2-122) (emphasis added). This

language was not offered. By definition, an "accident" is an event that occurs in the absence of negligence. *See generally Tolbert v. Duckworth*, 262 Ga. 622, 623 (1992) (citation omitted) (clarifying that an "accident" is the "denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury"). Progressive's requirement that Appellants sign a release describing the collision as an "accident" was not identical to the Offer and constituted a rejection because it was an "additional representation[] or expression[] of understanding or agreement relating to denials of liability or non-admissions of liability."[3] (V2-105; 122).

(B) The statement of no other insurance was excluded from the release and was not referenced as part of the consideration for the release. The Offer stated that "[i]f 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, note 20). Progressive sent a release that directly excluded the sworn statement as comprising part of the

[3] This issue was not raised below, but it is properly before the Court because the parties agree that contract formation is a question of law that is reviewed *de novo*. (*See* App. Br., p. 12).

consideration. (V2-122). The only consideration referenced in the release was the settlement sum. (V2-122).

(C) The release added a representation from a notary that was not offered. The Offer stated that "the release must not include any additional terms, conditions, or representations by anyone that are not specifically offered in this offer of compromise." (V2-95). Contrary to this plain term in the Offer, Progressive sent a release that required a representation from a notary public. (V2-123).

(D) The release required a representation that signing it was the free act and deed of Appellees when Appellees did not offer that representation. The Offer provided "[p]lease be aware that, under Georgia law, our offer of compromise must be accepted unequivocally and without variance of any sort and that a purported acceptance of this offer of compromise which imposes ***or even requests*** terms, conditions, or representations beyond those contained in this offer will be a counteroffer and rejection." (V2-101). Appellees' Offer did not offer the representation that the signing was of their "free act and deed," but Progressive included this additional term in its release. (V2-123). It is uncontested that Appellees never signed the release, and the facts of this case show that they are unwilling to do so unless forced by a court (which, by definition, would mean that signing would not be their free act and deed).

Appellees returned the check from Progressive because the response was not identical with the terms of their Offer and because Appellees did not want to accept the terms at variance with their Offer. After Appellees and Progressive exchanged additional offers without reaching an agreement, Appellees filed suit, and Appellant filed her motion to enforce. The trial court properly denied the motion.

II. PART TWO: ARGUMENT AND CITATION OF AUTHORITIES.

Settlement contracts in personal injury cases are no different than any other contracts and are subject to the same requirements for contract formation. *Woodard*, 300 Ga. at 852. To form a contract, there must be an offer and an acceptance of that offer. *Id.* The acceptance must be "unconditional," "identical," "unequivocal," and "without variance of any sort." *Id.* Under Georgia law, the offeror is the master of the offer. *Id.* at 853. If the offeror requires acceptance of the offer to be made by the completion of an ***act***, there is no acceptance and no contract unless the recipient of the offer completes the act exactly as required. *Pritchard,* 357 Ga. App. at 289. As this Court has explained: "An acceptance must comply with the requirements of the offer as to the performance to be rendered. [A]n offeree's failure to comply with the precise terms of an offer is generally fatal to the formation of a valid contract." *de Paz,* 361 Ga. App. at 295.

If the purported acceptance varies in any way from the offer, the purported acceptance is a rejection and counteroffer as a matter of law. *Duval & Co. v. Malcom*, 233 Ga. 784, 787 (1975); *Kemper v. Brown*, 325 Ga. App. 806, 808 ("A purported acceptance of an offer that varies even one term of the original offer is a counteroffer.").

Progressive did not accept Appellees' Offer "identically" and "without variance of any sort." Its response did not comply with the ***act*** of providing a compliant release and specifically varied from the terms of the Offer in at least four ways.

*A. Acceptance of Appellees' Offer Required the **ACT** of Delivering a Release That Complied with the Offer, and Progressive Delivered a Release that Did **Not** Comply with the Offer.*

There are two lines of cases - those where acts are required for acceptance and those where a promise is required for acceptance. *See Yim v. Carr*, 349 Ga. App. 892, 907-08 (2019) (discussing the lines of cases where the presentation of a proper release was and was not a requirement for acceptance). Appellees' Offer required the completion of specific ***acts*** for acceptance. One of those acts required for acceptance and contract formation was the delivery of a release that complied with the Offer. The Offer specifically said that, "[i]f Progressive does not perform the ***ACT*** of delivering a release that fully complies with each and every requirement of this offer, this offer has not been accepted." (V2-95). Appellees' Offer further specified that "[i]f

Progressive delivers a release that does not comply with each and every requirement of this offer of compromise, it will be a rejection of this offer, and it will constitute a counteroffer." *Id.* As shown below, the release provided by Appellant Simmons varied from the Offer, and, accordingly, no contract formed.

B. Appellees Stated They Would Not Agree to Language that Denied Negligence, and Progressive Made a Counteroffer by Proposing Un-Offered "Accident" Language.

Appellees stated (and it is indisputable) that Appellant Simmons caused the underlying collision. Accordingly, Appellees' Offer stated that Appellees would not sign any document that included a denial of liability or a non-admission of liability. Specifically, Appellees' Offer stated that any request for "representations or expressions of understanding or agreement relating to denials of liability or non-admissions of liability would be a counteroffer." (V2-105).

Under Georgia law, an "accident" is an event that occurs in the absence of negligence. *See generally Tolbert v. Duckworth*, 262 Ga. 622, 623 (1992) (citation omitted) (clarifying that an "accident" is the "denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury"); *Kelly v. Adams*, 197 Ga. App. 574, 575 (1990) ("The defense of accident in this state is to be confined to its strict sense as an occurrence which takes place in the absence

of negligence and for which no one would be liable.").[4] Contrary to the Offer, Progressive added language in the release stating that Deborah Bates' "injury and death [were] the result of a motor vehicle ***accident***." (V2-122) (emphasis added). This language was not offered. Moreover, the inclusion of "accident" language in the release necessarily represents, expresses, and agrees to an absence of negligence, which is a denial of liability and a non-admission of liability. Progressive added the "accident" language in spite of the prohibition in the Offer. Parties often disagree about whether a release will include an admission, acknowledgment, denial, or non-admission of fault or liability. When parties cannot agree on this (or any other term), there is no deal and no contract.

C. Contrary to the Offer's Terms, the Release Excluded the Affidavit Of No Other Insurance From Comprising Part of the Consideration.

Appellees' Offer stated that the affidavit of no other insurance was a part of the consideration necessary to form an agreement and that, if there is "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

[4] This issue was not raised below, but it is properly before the Court because the parties agree that contract formation is a question of law that is reviewed *de novo*. (*See* App. Br., p. 12).

offer of compromise." (V2-94, note 20). Despite this requirement, Progressive sent a release that mentioned the settlement sum as consideration and did not mention (i.e., excluded) the affidavit from constituting part of the consideration. (V2-122). Consequently, no contract formed. *Accord Ligon v. Hu*, 363 Ga. App. 251, 253 (2022) (finding no contract formed because "the release did not comply with the offer requirement that it include specific reference to an affidavit stating that there was no other insurance coverage available"). *Ligon* controls and requires the trial court's order to be affirmed because there was no acceptance and no contract.

D. As in Ligon, There Was No Acceptance Because the Offer Required a Release That Complied with the Terms of the Offer, and Further Specified That Representations from Additional Parties Would Be a Counteroffer.

A release with notarized signatures is not identical to a release without notarized signatures. Appellees' Offer stated that the release could not have "representations by anyone not specifically listed in the offer" and that sending a release with representations different than those offered "will be a counter-offer and rejection." (V2-95; 101). Progressive rejected this term and made a counteroffer by requiring a representation from a notary in the release. (V2-102-103). By including a term that Appellees defined as a rejection, Progressive rejected the Offer. *Ligon*, 363 Ga. App. at 253 (finding no acceptance because the release included a line for a notary despite the language in the offer that stated additional signature lines would be

a rejection). Because the purported acceptance was not identical, no contract formed.

E. Progressive Made a Counteroffer by Proposing an Un-offered Representation That Signing the Release Was Appellees' "Free Act and Deed."

For the same reason that the notary requirement violated Appellees' Offer, so too did the requirement in the release that Appellees swear, at the time of their signature, that their signatures were of their own "free act and deed." Like the notary requirement, this additional representation was not offered. Appellees advised that additional representations in the release would be counteroffers; and Appellants' insurer proposed this additional representation anyway. Appellees' Offer did not offer the representation that the signing the release was their "free act and deed," but Progressive included this additional term in its release. (V2-123). It is uncontested that Appellees never signed the release, and the facts of this case show that they are unwilling to do so unless forced by a court (which, by definition, would mean that signing would not be their free act and deed). Like the notary requirement, this additional proposed representation prevented the formation of a contract.

F. Given That the Standard for Contract Formation Has Been Affirmed by the Supreme Court More than Ten Times and Has Been Faithfully Applied by this Court Ten Times in the Last Four Years, the Court Can Disregard Appellant's Arguments That Do Not Rely on this Standard.

Appellant confuses the issue before the Court by repeated reference to cases involving the interpretation of formed contracts rather than an analysis of whether a

contract ever formed in the first place. (*See, e.g.*, App. Br., pp. 10-11; 19; 28-34). The inquiries are not similar or even overlapping: whether a contract has formed is a different question than how a formed contract must be construed. *Compare* O.C.G.A. § 13-3-2 ("The consent of the parties being essential to a contract, until each has assented to all the terms, there is no binding contract) *with* O.C.G.A. § 13-4-20 ("Performance, to be effectual, must be accomplished by the party bound to perform, or by his agent where personal skill is not required, or by someone substituted, by consent, in his place, and must be substantially in compliance with the spirit and the letter of the contract and completed within a reasonable time."). This Court has addressed contract formation issues relating to offers made under O.C.G.A. § 9-11-67.1 ten times in the last four years. Not one of those cases helps Appellant's argument because each uses the standard that an acceptance must be identical. Identical means identical, and the stray quotes from contractual interpretation cases are irrelevant.

Likewise, "Appellant's" safe harbor argument has nothing to do with the issue before the Court. (*See, e.g.*, App. Br., pp. 34-35, citing *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 686 (2003)). The safe harbor defense assumes that no contract ever formed. Then there is an analysis of whether the insurance company met all of the terms within its control. If the insurance company met all of the terms

within its control, then it would be able to establish a safe harbor against claims that it was negligent in failing to settle. Since the parties to this case are arguing solely about matters within Progressive's control, like the language it included and excluded from the release it drafted, the safe harbor analysis could not apply even if this was an insurance bad-faith case. More importantly, this is not an insurance bad-faith case, and "safe harbors" do not bind unwilling injured persons to contractual terms they did not offer or agree upon.

Finally, Appellant rehashes policy arguments about O.C.G.A. § 9-11-67.1 and *Southern General Insurance Co. Holt*, 262 Ga. 267, 269 (1992). There are, of course, two sides to those policy arguments, and anyone interested in engaging in those arguments should head to the Capitol next session where they will undoubtedly address whether further changes to the law are necessary and prudent. Those policy arguments have no place in this Court, however, particularly when the legal standard at issue is so well-established.

III. CONCLUSION.

Under settled law that has been repeatedly affirmed in the Georgia Supreme Court and this Court, there was no acceptance and no contract formed. Appellant had the burden to establish an acceptance that was "identical" and without variance of any sort from the terms of the Offer. Since there were, at a minimum, four variances

between the terms of the Offer and the response from Progressive, there was no acceptance. Appellees respectfully request that this Court affirm the ruling of the trial court and hold that no contract formed.

This submission does not exceed the word count limit imposed by Rule 24.

This 25th day of June, 2022.

/s/ Ben C. Brodhead

Brodhead Law, LLC
3350 Riverwood Parkway, Suite 2230
Atlanta, Georgia 30339
(404) 846-0100
Ben@brodheadlaw.com
Ashley@brodheadlaw.com
Michael@brodheadlaw.com

Ben C. Brodhead, Esq.
Georgia Bar No. 084127
Ashley B. Fournet, Esq.
Georgia Bar No. 271540
Michael Arndt, Esq.
Georgia Bar No.836284
Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

In accordance with Georgia Court of Appeals Rule 6(b), the undersigned hereby certifies that I have this day served counsel for all parties in this matter with a copy of the foregoing **APPELLEES' RESPONSE BRIEF** by U.S. mail, with adequate postage for delivery, to the following:

R. Christopher Harrison, Esq.
Jackson A. Griner, Esq.
Downey & Cleveland, LLP
288 Washington Avenue
Marietta, GA 30060-1979

John P. Webb, Esq.
Smith, Welch, Webb & White, LLC
280 Country Club Drive, Suite 300
Stockbridge, GA 30281

This 25th day of June, 2022.

/s/ Ben C. Brodhead

Brodhead Law, LLC
3350 Riverwood Parkway, Suite 2230
Atlanta, Georgia 30339
(404) 846-0100
Ben@brodheadlaw.com
Ashley@brodheadlaw.com
Michael@brodheadlaw.com

Ben C. Brodhead, Esq.
Georgia Bar No. 084127
Ashley B. Fournet, Esq.
Georgia Bar No. 271540
Michael Arndt, Esq.
Georgia Bar No.836284
Attorneys for Plaintiffs-Appellees