IN THE COURT OF APPEALS

STATE OF GEORGIA

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

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

REPLY BRIEF OF APPELLANT

R. Christopher Harrison, Esq.
Georgia Bar No. 333199
Jackson A. Griner, Esq.
Georgia Bar No. 495020

Downey & Cleveland, LLP
288 Washington Avenue
Marietta, Georgia 30060
harrison@downeycleveland.com
griner@downeycleveland.com
(770) 422-3233

INTRODUCTION

As anticipated by Appellant Judy Simmons (hereinafter referred to as the "Appellant") in her Brief of Appellant (hereinafter referred to as "Appellant's Brief"), the Appellees have attempted to manufacture material variances between the offer and the acceptance that do not exist. As such, any attempt by the Appellees to rely on legal authority that discusses *actual*, material variances between an offer and an acceptance fails and is not controlling. Here, the terms of the first offer presented in the underlying case (hereinafter referred to as the "First Offer") were subject to a *plain meaning*, were fully complied with *pursuant to that plain meaning*, and thus were properly accepted. *See* (V2-70-108; 118; 119.); *see also Imaging Systems International, Inc. v. Magnetic Resonance Plus, Inc.* 241 Ga. App. 762 (2000).

Because no actual variance between the First Offer and the offerees' acceptance, material or immaterial, can be shown, the precedent authority provided by the Appellees is uninstructive. Instead, a *plain and reasonable interpretation* of the terms of the First Offer is all that must be applied here to confirm the creation of the valid settlement agreement. In short, the Appellees cannot dispute that (1) the First Offer never prohibited the word '*accident*,' obviously used as a general term, from being included in the release; (2) the First Offer contained no provision

mandating that the affidavit of no additional insurance be mentioned, *by its title*, in the release; or (3) that the First Offer, by offering a release without additional "representations," at no point prohibited notarization by a notary and their related notarial act. Rather, because the First Offer was timely and properly accepted pursuant to a *plain meaning* and *reasonable interpretation* of the terms of the First Offer, the Appellant respectfully urges this Court construe the Appellees' *unreasonable and self-serving interpretation* against them, reverse the decision of the trial court, and remand this matter with instructions for the trial court to grant the Appellant's Motion to Enforce Settlement.

FACTS ALLEGEDLY IN DISPUTE

In Appellee's Response Brief (hereinafter referred to as "Appellee's Brief"), the Appellees begin their discussion of the facts allegedly in dispute by discussing some titling used in Appellant's Brief. Namely, the Appellees posit that the Appellant was simply a "stranger to failed negotiations" between her insurer, Progressive Premier Insurance Company (hereinafter referred to as "Progressive") and the Appellees. See *Appellee's Brief* at 3.

Certainly though, because there is no dispute as to the fact that the Appellee's claims in the underlying case are asserted against the Appellant, with Progressive simply operating as a purported third-party payor of said claims, it is clear that such

a contention need not be considered by this Court. The First Offer was obviously associated with claims asserted against the Appellant. (V2-70-108). The First Offer was merely sent to Progressive as a third-party payor, thereby enabling it to respond directly. Nonetheless, it was openly delivered in connection with the claims asserted by the Appellee against the Appellant. *Id.* As such, this contention by the Appellees is of no relevance to this matter, nor to the underlying case, and can be quickly dispelled.

Separately, and more relevant to this Appeal, the Appellees next contend that the terms of the First Offer were rejected, and a counteroffer delivered. See *Appellee's Brief* at 3. To this point, the Appellees argue that Progressive and the Appellant (hereinafter collectively referred to as the "Offerees"), through their July 26, 2019, correspondence and July 29, 2019, correspondence (hereinafter collectively referred to as the "Acceptance"), failed to deliver a release that complied with all terms of the First Offer. *See id; see also* (V2-70-108; 118; 119-123).

Particularly, the Appellees first contend that because the car wreck at issue in the underlying case (hereinafter referred to as the "Incident") was referred to as an "accident" in the release, the delivery of the release along with the Acceptance constituted a rejection and counteroffer. See *Appellee's Brief* at 4. However, as will be discussed in more detail hereinafter, nowhere in the First Offer was it mandated

that the specific word "accident," understandably being used as a general term, could not be in the release, nor was it even mandated that the Appellant admit fault for the Incident. (V2-70-108). Further, no assertions of intentional conduct associated with the Incident have been made by the Appellees. Amounting usage of the word "accident" to both an intentional denial of fault, *and* an intentional rejection of the First Offer, is not only illogical, but also accentuates that the Appellees specifically adopted a *self-created, self-serving, and unreasonable interpretation* of what the First Offer required solely for the purposes of arguing that the offer was rejected, thereby opening the door to a potential bad faith claim against Progressive.

Further, this contention was also not argued to any extent before the trial court, further highlighting the fishing expedition being conducted by the Appellees, but also confirming that the same is not even properly raised herein, a point discussed in further detail hereinafter.

Second, the Appellees assert that the release included with the Acceptance "directly excluded" the affidavit of no additional insurance from comprising part of the consideration of the agreement, and therefore constituted a rejection and counteroffer. See *Appellee's Brief* at 5-6. This contention though, like the last, is not only without merit, but succinctly shows that the Appellees' position results from their self-serving and unreasonable interpretation of what the terms of their own First

Offer required.

Specifically, the record shows 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). Upon conducting a plain reading of the above excerpt from the First Offer, 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 another, opposite term*. In short, an offer providing that *language excluding a term must not be included*, and a separate offer providing that *language including a term must be included,* are not the same offer. The First Offer is the *former* of these two types of offers, while, interestingly, the second offer presented to the Offerees, delivered on October 22, 2019, (hereinafter referred to as the "Second Offer") is of the *latter* type. (V2-220-260).

The First Offer may very well have prohibited language expressly removing the affidavit of no insurance from being in within the release provided in response. It certainly *did not*, however, mandate that the affidavit of no insurance *be mentioned by name* as part of the consideration within the release. (V2-70-108). Because the Appellees cannot point to any language in the First Offer expressly mandating that

the affidavit of no insurance be mentioned by name in the release and cannot point to any language of the Acceptance which did *directly exclude* said affidavit from being part of the consideration, they also cannot point to any term of the First Offer that was uncompiled with in this respect. As such, a valid and enforceable settlement agreement was created.

The Appellees also submit, thirdly and fourthly, that the Offerees' Acceptance served as a rejection and counteroffer because it included a line on which for a notary to sign, and language stating that the Appellees were executing the release as their "free act and deed." These arguments, even more so than the above, simply defy logic.

By its terms, the First Offer excluded additional 'representations,' but did not prohibit notarizations, because the word 'representation' does not include mere statements of validation or confirmation of actual representations made by others. *See* 'Representation Definition,' *Black's Law Dictionary*. A "representation" includes statements of fact or substance, like those made by the party or parties actually executing the release (the Appellees in this case) but does not include mere affirmations of others' statements of substance. Additionally, it truly defies logic to claim that there is no meeting of the minds because of language stating the agreement was made as a 'free act and deed.' In fact, confirming whether a document is being

executed as the 'free act and deed' of the signor is simply part of a notary's typical notarial act, to ensure that duress is not in play. *See* O.C.G.A. § 13-5-6.

Nowhere in the First Offer was any express statement that the inclusion of a notary's notation was prohibited. Rather, only additional "representations" were prohibited. (V2-70-108). Thus, the Offerees complied with a plain and reasonable interpretation of this term as well as all other terms of the First Offer, thereby creating a valid settlement agreement

The Appellees also contend, with regard to the Second Offer served upon the Offerees, that the "details of the Second Offer . . . are not relevant to any issue here." *See Appellee's Brief* at 3. This Court should not be surprised by this contention though, because the terms of the Second Offer clearly demonstrate that the Appellees crafted the terms of both the First Offer and Second Offer not in an attempt to resolve the underlying case, but rather with the goal of being able to make arguments akin to those set out in Appellee's brief.

For example, while the First Offer included the language provided just above, the *Second Offer, on the other hand*, provided as follows:

> 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, and **especially the change of the language** between the First Offer and Second Offer, prove that the First Offer did not require the release provided with the Acceptance to include language mentioning the affidavit of no additional insurance by its title. (V2-70-108; 220-260). Instead, the First Offer merely mandated that no language *excluding* the affidavit of no additional insurance as part of the consideration be included. *Id.* The wording of the Second Offer shows that that the wording of the First Offer was too definite for the Appellees' intended uses, and prevented them, as it should here, from arguing that any potential acceptance of the First Offer was actually a rejection and counteroffer, necessitating that the wording be changed. *See Id.* Overall, the First Offer required that the affidavit not be *excluded* as consideration, *which it was not*, and that the affidavit be delivered with the Acceptance, *which it was*.

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.

ARGUMENT AND CITATION TO AUTHORITY

In the underlying case, the Offerees received the First Offer, and then (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 they had *control*, thereby creating a valid settlement agreement. *See Cotton States Mut. Ins. Co. v. Brightman*. 276 Ga. 683, 686 (2003); *see also Crystal Cubes of Stone Mountain, Inc. v. Kutz*, 201 Ga. App. 338 (1991).

The Appellees purport that no settlement was created because the release attached to the Acceptance did not conform to the terms of the First Offer. As shown, however, the Appellees' contention that the Acceptance served as a rejection and counteroffer results directly from their *self-created, self-serving, and facially unreasonable interpretation* of what the terms of the First Offer required. 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 acts conducted by the Appellant, the ambiguity read into the agreement by the Appellees should be construed against them pursuant to the doctrine of *Contra Proferentem*, and a more reasonable, plain interpretation of the First Offer adopted.

However, notwithstanding the above, the Appellees still contend that the

Acceptance was a rejection and counteroffer, and not only assert the same three variances argued before the trial court, but now include an additional argument which was *not raised at all before the trial court nor at any point prior to this Appeal*. See *Appellee's Brief* at 4.

Specifically, the first alleged variance asserted by the Appellees is that the release delivered with the Acceptance included the word, "accident." *Id.* Importantly though, because this contention was not raised at any point prior to this appeal, and was not argued before the trial court, it has been waived, and can quickly be thrown out by this Court when evaluating the issues properly raised. *See Locke's Graphic & Vinyl Signs, Inc. v. Citicorp Vendor Fin., Inc.*, 285 Ga. App. 826, 828 (2007): ("An argument not raised in the trial court is waived and cannot be raised for the first time on appeal."); *citing Bowman v. Century Funding, Ltd.*, 277 Ga. App. 540, 543 (2006); *Smith v. Laymon*, 279 Ga. 823, 824 (2005); *Coweta Cnty. v. City of Senoia*, 275 Ga. 707, 708 (2002); *Hammond v. Paul*, 249 Ga. 241, 241 (1982).

Notwithstanding the Appellees' waiver of this argument, and the well-settled precedent concerning the same, it is still worth a brief discussion of the sheer irrationality of the argument itself, especially given that the term was used as a general term synonymous with 'collision' or 'wreck.' Appellees cite *Tolbert v. Duckworth* and *Kelly v. Adams* in support of their argument that usage of the term,

'accident,' might render whatever document it is inscribed upon a denial of fault, but this argument is baseless. 262 Ga. 622, 623 (1992); 197 Ga. App. 574, 575 (1990).

Particularly, *Tolbert* and *Kelly* discuss *not* the definition of the word "accident" itself, but rather the implications that the 'legal accident' *jury charge* might have upon jurors before rendering a verdict. *Id.* Moreover, these cases define what a 'legal accident' is, but only in the context of the specific jury charge. *Id.* The cases then go on to use the word 'accident' as a general term, just as the release delivered with the Acceptance did. The cases do not, however, discuss the implications, if any, that the word 'accident' might have in other contexts. *See id.* Thus, this authority is misapplied by the Appellees. If this contention had any merit, the Appellees may have asserted the same in the trial court. They failed to raise this argument, however, and therefore have waived it. *Locke's Graphic & Vinyl Signs, Inc.*, 285 Ga. App. at 828; *Bowman*, 277 Ga. App. at 543; *Smith*, 279 Ga. at 824; *Coweta Cnty.*, 275 Ga. at 708; *Hammond*, 249 Ga. at 241.

The Appellees further contend in Appellees' brief, as their second purported variance, that the release delivered along with the Acceptance "directly excluded" the affidavit of no additional insurance from comprising part of the consideration, and thus constituted a rejection and counteroffer. See *Appellee's Brief* at 5-6. Interestingly, this contention is nuanced from their argument presented to the trial

court, wherein they argued that "Progressive's Release [sent] with the purported acceptance only mentioned the settlement sum and failed to include the affidavit as part of the consideration[.]" (V2-443; 445). Worth noting, the phrase 'failed to include,' and 'directly excluded,' are not synonymous. While the release delivered with the Acceptance may have indeed omitted mention of the affidavit of no additional insurance by name, which was not prohibited by the First Offer, the Acceptance in no way *directly excluded* the affidavit of no additional insurance as purported by the Appellees.

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*, however, mandate that the term 'affidavit of no additional insurance' be included. *See* (V2-94, fn. 20); *see also Imaging Systems International, Inc. v. Magnetic Resonance Plus, Inc.* 241 Ga. App. 762 (2000).

Additionally, the Appellees allege as the third purported variance between the First Offer and the Acceptance that the release included with the acceptance mandated an un-offered representation from a notary. *See Appellee's Brief* at 11.

Nonetheless, this alleged variance is also based upon a self-serving and unreasonable interpretation of the terms of the First Offer.

In examining the language of the First Offer, it is clear it mandated that no "*representations*" other than that of the releasor, would be provided. 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). Thus, a representation includes only statements *of fact* made in order to induce another to act. The definition does not include mere statements of confirmation or authentication. *See id.*

The fourth purported variance asserted by the Appellees between the First Offer and the Acceptance is that the Acceptance purportedly proposed an un-offered representation that the Appellees were executing the release as their own *free act and deed*. *See Appellee's Brief* at 12. However, the First Offer did not expressly exclude this notation either. Instead, the First Offer sought to exclude additional 'representations,' which does not include statements of validation and confirmation. *See* 'Representation Definition,' *Black's Law Dictionary.*

Considering these purported variances, 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. The Appellees never intended to settle this claim, a point made clear by the language of both offers at issue, the Appellees' attorney's 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; 118-119; 220-260); *see also* (V2-213).

The cases submitted by the Appellee 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 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.

In short summary of the underlying case, 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*. It is 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). And in doing so, the Appellees adopted an unreasonable, varying interpretation of the terms of the First Offer, thereby providing them with the argument that the Acceptance was actually a rejection and counteroffer.

Notwithstanding these tactics and abuses, this Court has the ability to provide clarification on when a response will be deemed a rejection and counteroffer, versus when the facts indicate that a response has complied with a *reasonable interpretation of the terms of an offer*, but just not with the offerors' self-serving interpretation of their own terms. Such clarification, and the application of the doctrine of *Contra Proferentem* is certainly needed in the underlying case.

In 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." *Imaging Systems International, Inc.*, 241 Ga. App. 762 (2000). On the other hand, when the construction or terms of a contract are ambiguous, they are to be construed against the drafter. O.C.G.A. § 13-2-2(5). Further, the Georgia

Supreme Court has held, "[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); *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); *Envision Painting, LLC v. Evans*, 336 Ga. App. 635 (2016): ("[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").

Because the variances alleged result 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 pursuant to the doctrine of *Contra Proferentem*, and a valid settlement agreement recognized in the underlying case.

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 (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 purport that no settlement was created and allege variances between the terms of the First Offer and the Acceptance. As shown though, the variances alleged by the Appellees result not from what was included with the Acceptance, but rather from the Appellees' own *self-created, self-serving, and unreasonable* interpretation of the terms of their First Offer. For these reasons, the doctrine of *Contra Proferentem* should control, and the Appellees' interpretation construed against them, thereby recognizing the valid and enforceable settlement agreement created in the underlying case.

WHEREFORE, the Appellant hereby respectfully urges this Honorable Court to reverse the trial court's January 20, 2022, decision and remand this matter with instructions 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.

By: /s/ R. Christopher Harrison

R. CHRISTOPHER HARRISON
Georgia State Bar No. 333199
harrison@downeycleveland.com
JACKSON A. GRINER
Georgia State Bar No. 495020
griner@downeycleveland.com
Attorneys for Appellant

Downey & Cleveland, LLP
288 Washington Avenue
Marietta, GA 30060
T: (770) 422-3233
F: (770) 423-4199

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: A22A1460
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:

Ben C. Brodhead, Esq.
Ashley B. Fournet, Esq.
Michael Arndt, Esq.
Brodhead Law, LLC
3350 Riverwood Parkway, Suite 2230
Atlanta, Georgia 30339

This 15th day of July, 2022.

[*Signature on next page*]

DOWNEY & CLEVELAND, LLP

By: /s/ R. Christopher Harrison

R. CHRISTOPHER HARRISON
Georgia State Bar No. 333199
harrison@downeycleveland.com
JACKSON A. GRINER
Georgia State Bar No. 495020
griner@downeycleveland.com
Attorneys for Appellant

Downey & Cleveland, LLP
288 Washington Avenue
Marietta, GA 30060
T: (770) 422-3233
F: (770) 423-4199