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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-001108
Civil Action No. 2015-CP-16-00815

Allstate Fire and Casualty Insurance Company, Respondent,

v.

Pamela Goodwin, Appellant.

PETITION FOR REHEARING

Angeline M. Larrivee (S.C. #105466)
Roy T. Willey, IV (S.C. #101010)
Eric M. Poulin (S.C. #100209)
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Attorneys for Appellant

The Appellant, Pamela Goodwin, respectfully submits this Petition for Rehearing under Rule 221, SCACR.

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT

I. The Court erred in concluding that the mirror-image rule does not apply to contract formation in the settlement-agreement context.

II. Assuming *arguendo* that Allstate's acceptance was valid, the Court impermissibly modified the contract.

On August 20, 2014, a driver pulled out in front of Appellant Pamela Goodwin's motorcycle. (R. p. 58). The resulting collision seriously injured Goodwin. (R. p. 453, lines 5-14). Goodwin promptly retained the Anastopoulo Law Firm ("Law Firm") to pursue the case. (R. p. 20).

On December 12, 2014, Law Firm sent Respondent Allstate (the at-fault driver's insurer (R. p. 13)) a time-limited Offer of Compromise requesting payment of all applicable insurance limits. (R. pp. 22-30). The Offer provided a clear and thorough explanation of its terms. (R. pp. 22-30). As relevant to this case, it demanded payment in one of two possible ways: (1) a cashier's check or (2) a certified bank check; it also requested the limits of all applicable policies, including property-damage coverage. (R. pp. 22-30).

Regarding the payment method, the Offer stated explicitly required cashier's checks or certified bank checks. It stated that "[s]ettlement funds must be paid by Cashier's Checks, or Certified Bank Checks (<u>not drafts</u>) issued by your insurance company as follows: Pamela Goodwin and the Anastopoulo Law Firm, LLC" and that "<u>[p]ayment must be made as described herein, and payment by any other method, including payment through the registry of any court . . . , will not satisfy the terms of this offer of compromise and will result in an immediate and automatic withdrawal of this offer of compromise</u>." (R. p. 25, p. 27 (emphasis in original)).

Regarding the property-damage policy, the Offer explicitly required Allstate to pay the limits of both the personal-injury and the property-damage policies. It "require[d] payment of the policy limits of all applicable policies" and stated that "***this offer relates only to personal injury and property damage claims . . . .***"; that the driver "will only be released with respect to the bodily injury and property damage coverages . . . ."[1] that "[t]his offer of compromise does not include the resolution of any claims for any person[s] or entities other than those injury and property damage claims made by Miss Goodwin."; and that ""Ms. Goodwin is . . . entitled to receive compensation for her property damage . . . ." (R. pp. 24-28 (emphasis in original)).

Furthermore, the Offer repeatedly emphasized the importance of complying with all of its conditions. (*See* R. p. 25 (emphasis in original) ("***If any condition is not met . . . this offer of compromise will be withdrawn . . . .***"); R. p. 28 ("[I]f your insurance company's actions and documents (i.e., your proposed Release, settlement check, etc.) do not comply with our offer of compromise, it will be a counteroffer and rejection of our offer"; "[I]n order to accept this offer of compromise, you must meet all of the terms and conditions of this offer of compromise, including, but not limited to, providing payment . . . that compl[ies] with the terms of this offer of compromise."; "If you do not pay policy limits and meet the other requirements contained in this offer within the specified time limit, we will withdraw our offer of compromise . . . ."); R. p. 29 (emphasis in original) ("***If any condition or requirement is not met by the specified deadline . . . then there has been no acceptance and no agreement.***"))

Contrary to the Offer's terms, Allstate issued a manual check which included only the bodily injury limits. (R. p. 417, lines 23-25; p. 419, lines 9-12; p. 421, lines 1-3). So, Law Firm withdrew the Offer, returned Allstate's check, and sued the at-fault driver. (R. pp. 16-17; p. 41).

[1] A phrase which appears twice, once in regular script and once in italicized, bold script.

On October 28, 2015, Allstate filed a declaratory-judgment action. In its amended summons and complaint, Allstate asked the court "to declare that . . . [t]he acceptance of the settlement demand, as demonstrated by Allstate's performance thereunder, on behalf of its insureds, is valid and enforceable . . . ." (R. pp. 12-18). About two years later, the parties filed competing summary-judgment motions. (R. pp. 53-57; pp. 84-87). On March 16, 2018, after a February 23 hearing, the trial court granted Allstate's motion but denied Goodwin's. (R. pp. 1-10). The court found that the Offer did not include a property-damage claim, and further held that "Goodwin's demand that Allstate issue a certified or cashier's check in payment of the claim is not a material term of the settlement in light of Allstate's payment of the claim with a valid insurance check"; thus, it held that "[t]he acceptance of the settlement demand . . . is valid and enforceable . . . ." (R. pp. 1-10). The court later denied Goodwin's subsequent motion to reconsider. (R. p. 11).

Goodwin appealed on June 15, 2018. After oral argument on February 1, 2021, this Court affirmed the trial court's decision on May 24, 2023. It held that "the form of the check was not an essential or material term of [Goodwin's] settlement demand," because "the demand letter itself made the required form of payment unclear" (allegedly because "neither a cashier's check nor a certified bank check [can be] 'issued by [the] insurance company'") and because Goodwin could not "articulate a logical reason supporting the argument that the form of the check was essential or material to the settlement." It also held that "Goodwin did not assert a property damage claim in the demand letter when she sought "payment of the policy limits of all the applicable polic[i]es," where the demand letter sought "a reasonable proposed Release that does not include indemnification or the release of property damage claims."

Significantly, even though Goodwin focused throughout the proceedings on Allstate's failure to accept her Offer under the mirror-image rule,[2] the Court relegated that argument to a footnote and summarily dismissed it.

As a logical consequence of these holdings, the Court held "that Allstate fulfilled its obligations under the bodily injury provision of the Policy by tendering Ham's bodily injury coverage limits and executing the documents required by Law Firm's demand letter."

This Petition for Rehearing follows.

STANDARD OF REVIEW

"Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Buonaiuto v. Town of Hilton Head Island,* Op. No. 5990 (S.C. Ct. App. filed June 14, 2023) (Davis Adv. Sh. No. 23 at 49) (quoting *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)). "Questions of law may be decided with no particular deference to the trial court." *Ibid.* (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008)).

ARGUMENT

I. The mirror-image rule applies to contract formation in the settlement-agreement context.

"In South Carolina, settlement agreements are viewed as contracts." *Hook v. S.C. Dep't of Health & Env't Control,* 439 S.C. 52, 73, 885 S.E.2d 442, 453 (Ct. App. 2023), *reh'g denied* (Apr. 20, 2023) (quoting *Abel v. S.C. Dep't of Health & Env't Control*, 419 S.C. 434, 438, 798 S.E.2d 445, 447 (Ct. App. 2017)). Therefore, "[t]he court's duty is to enforce" such an agreement

[2] Goodwin discussed the issue in depth in her brief (Appellant's Brief pp. 6-13); in her Motion for Summary Judgment (R. pp. 56-57); in the summary-judgment hearing (R. p. 418, line 7-p. 432, line 23); and in her Motion to Reconsider (R. pp. 374-80).

"regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully," *Hook*, 439 S.C. at 73, 885 S.E.2d at 453–54 (quoting *Abel*, 429 S.C. at 438, 798 S.E.2d at 447)—presuming that the parties made an agreement in the first place. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161–62, 136 S. Ct. 663, 670, 193 L. Ed. 2d 571 (2016), as revised (Feb. 9, 2016) (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 81, 133 S. Ct. 1523, 1533, 185 L. Ed. 2d 636 (2013) (Kagan, J., dissenting)) ("An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect.").

An agreement only exists if "the acceptance of the offer" is "absolute and identical with the terms of the offer." *Sossamon v. Littlejohn*, 241 S.C. 478, 486, 129 S.E.2d 124, 127 (1963) (quoting *Cohn v. Penn Beverage Co.*, 313 Pa. 349, 352, 169 A. 768, 769 (Pa. 1934)).[3] That is, "in order to form a contract," the offeree generally "pays, in return for the offeror's promise, exactly the consideration that the offeror has sought . . . . Thus, if an act is requested, that very act and no other must be performed." 2 Richard A. Lord, *Williston on Contracts* § 6:11 (4th ed. 2023). This is especially so if the offeror "insist[s] on a prescribed type of acceptance." *See* Restatement (Second) of Contracts § 58 cmt. a (1981) (even if "[u]sage of trade or course of dealing permit[s] inconsequential variations," "the offeror is entitled, if he makes his meaning clear, to insist on a prescribed type of acceptance" because "the offeror is the master of his [or her] offer"); *Fender & Latham, Inc. v. First Union Nat. Bank of S.C.*, 316 S.C. 48, 49–51, 446 S.E.2d 448, 449–50 (Ct. App. 1994) (citing Restatement (Second) of Contracts § 58 for the proposition that "if an offer prescribes the manner of acceptance, the offeree must comply with its terms in order to create a contract," and holding that "there was no enforceable contract between the parties [where the

[3] Or, in the words of *Columbia Hyundai, Inc. v. Carll Hyundai, Inc.*, 326 S.C. 78, 80–81, 484 S.E.2d 468, 469 (1997) (citing *Sossamon*, 241 S.C. 478, 129 S.E.2d 124): "At common law, a purported acceptance" must "mirror" the terms of the offer.

offeree] did not comply with the requirements of [the offeror's] offer."); Howard O. Hunter, *Modern Law of Contracts* § 4.6 (2023 ed.) (citation omitted) ("The offeror is free to establish whatever requirements the offeror deems appropriate for the offeree to follow in making an acceptance. The offeree cannot make a valid acceptance . . . without adhering to the requirements of the offer.").[4]

[4] Admittedly, our courts have had scant opportunity to consider offers of compromise like the one at issue here. However, several recent Georgia decisions supply valuable guidance.

In *de Paz v. de Pineda*, the Georgia Court of Appeals relied on the principle that "when an act is required to accept an offer, that precise act must be performed or there is no meeting of the minds and no formation of a contract" in holding that the defendant did not accept the plaintiff's offer of compromise. 361 Ga. App. 293, 293, 297, 864 S.E.2d 134, 135, 137–38 (2021), *cert. denied* (Mar. 22, 2022). In that case, the offer of compromise specified—as an "express requirement[] for acceptance"—that plaintiff's counsel had to receive the payment within a certain period. *Id.* at 293, 864 S.E.2d at 135. The only reason plaintiff's counsel did not receive the payment within that period was because, through no fault of the defendant, UPS failed "to deliver the payment." *Id.* at 299, 864 S.E.2d at 139. Yet "regardless of [the defendant's] good faith or intentions," the parties did not form a contract. *Id.* at 299–300, 864 S.E.2d at 139.

In *Ligon v. Hu*, the plaintiff's offer of compromise "provided that certain acts were material to acceptance . . . "and must be completed without variance of any sort to form a binding contract." 363 Ga. App. 251, 253–54, 870 S.E.2d 802, 803–04 (2022), *cert. denied* (Nov. 17, 2022). One of the multiple requirements, for example, provided "that the release only include signature lines for the [plaintiff and his wife] and . . . that the inclusion of a signature line for anyone else "for any purpose at all will be a counteroffer and rejection of this offer." *Id.* at 252, 860 S.E.2d at 803. When the insurer provided noncompliant documents, such as a release which "included a signature line for" an additional person, the Court of Appeals held that the insurer failed to accept the offer. *Id.* at 253–54, 860 S.E.2d at 803–04.

And in *White v. Cheek*, the plaintiff's offer of compromise required that all "communications . . . initiated by or on behalf of your insurance company or your insured relating to this offer of compromise ***must be made in writing***." *White v. Cheek*, 360 Ga. App. 557, 563, 859 S.E.2d 104, 109 (2021), *reconsideration denied* (July 12, 2021), *cert. denied* (Feb. 1, 2022) (emphasis in original). Despite this requirement, the defendant's insurer "left . . . voicemails . . . that expressly mentioned receiving the offer, questioned liability, and sought further information about the claim." *Ibid.* Therefore, the Court of Appeals held that the insurer "violated the express terms of the offer" and "the parties did not reach a binding settlement agreement." *Ibid.*

Also in *White,* the Court of Appeals made a statement the touches on another aspect of the present case: the Court dismissed the defendant's argument "that our holding 'sets up' insurers for 'bad faith' claims, stating that the case was ultimately "not about bad faith," but rather "about the basic contract principle that the offeror is the master of his offer." *Id.* at 564, 859 S.E.2d at 109.

But see Crystal Cubes of Stone Mountain, Inc. v. Kutz, 201 Ga. App. 338, 338–39, 411 S.E.2d 53, 55 (1991) (holding, more than thirty years ago, that acceptance which included proposal

Despite these longstanding principles, this Court dismissed the mirror-image rule in a footnote, quoting its earlier opinion in *Weisz Graphics Division of Fred B. Johnson Co., v. Peck Industries, Inc.*, 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991): "the 'so-called "mirror-image" rule[ ] is well suited to simple, one time transactions, in which the parties contract face to face. However, it fails to accommodate the realities of much modern commercial practice.'" Thus, the Court decided Goodwin's case as a matter of contract interpretation, not contract formation.

But in rejecting the mirror-image rule out of hand, this Court neglected the original statement's context. *Weisz* dealt with the sale of goods—not with other transactions, such as settlement agreements. In stating that the mirror-image rule "fails to accommodate the realities of much modern commercial practice" and in citing such concerns as "[t]he rise of mass produced goods" and "the growth of markets," the *Weisz* court sought to explain why "the Uniform Commercial Code modifies" the rule. 304 S.C. 101, 106–07, 403 S.E.2d 146, 149 (Ct. App. 1991). These modifications, as relevant to the case at bar, concern the sale of goods. *Ibid.*; *see* Uniform Commercial Code § 2-102; *cf.* *Columbia Hyundai, Inc. v. Carll Hyundai, Inc.*, 326 S.C. 78, 80–81, 484 S.E.2d 468, 469 (1997) (noting that S.C. Code Ann. § 36–2–207 (which applies solely to the sale of goods, S.C. Code Ann. § 36-2-102) "was designed to abrogate the rather severe consequences of the 'mirror image' rule."

Weisz and *Columbia Hyundai* clarify that certain statutory provisions have mitigated the admittedly "severe" consequences of the mirror-image rule, where transactions in goods are concerned. In doing so, however, they highlight the singular nature of transactions in goods. And although South Carolina courts have not addressed the mirror-image rule in the settlement-offer

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to submit the required materials "one day later than originally proposed" was valid acceptance, because the one-day difference was not "a material change in the terms of the offer.")

context, *Weisz* and *Columbia Hyundai* reveal by implication that the rule applies to transactions not related to goods, *see Sossamon*, 241 S.C. at 486, 129 S.E.2d at 127—transactions which include settlement agreements.

Here, Allstate's purported acceptance was not an acceptance under the mirror-image rule. The Offer specifically demanded that Allstate produce cashier's checks or certified bank checks. Contrary to this Court's opinion, the demand was clear; the requirement for checks "issued by [the] insurance company" does not inject ambiguity into the method-of-payment terms. The only possible ambiguity arises from sophisticated linguistic analysis of the phrase "issued by"; an ordinary reading does not raise this problem, as Goodwin has previously argued. *See* R. p. 352 ("[Allstate] asserts that it cannot issue a cashier's check or certified bank check. Surely, common business practice would show that if [Allstate] has a checking account, . . . it has the ability to obtain from said bank the type of check required . . . .").

As an aside, assuming *arguendo* that the mirror-image rule contains a materiality requirement—which it does not (as our Supreme Court confirmed when it discussed the rule's "severe consequences" in *Columbia Hyundai*)—the production of a cashier's or certified bank check was a material term of the Offer. *See Sossamon*, 241 S.C. at 486, 129 S.E.2d at 128 ("The time and manner of payment of the purchase price . . . was a material part of the transaction in this case . . . ."); Rule 1.15(f)(1), RPC, Rule 407, SCACR (suggesting that a "check drawn by . . . an insurance company" is riskier than a certified check or cashier's check by allowing a lawyer to disburse an unlimited amount of funds from a trust account in reliance on a certified check or a cashier's check, but only allowing a lawyer to disburse up to $50,000 in reliance on an insurance-company's check).

In any case, the Offer also specifically demanded payment of all applicable policies, including the property-damage policy. Again, contrary to this Court's opinion, the demand for the property-damage limits was clear; the requirement of "a reasonable proposed Release that does not include indemnification or the release of property damage claims" did not negate the oft-repeated requirement for payment of the property-damage limits. Although it may seem logical that a party requesting property-damage limits would also be willing to release all property-damage claims, that is not what the Offer demanded.

Beyond these two specific requirements, the Offer repeatedly emphasized the necessity of conforming to all requirements listed. But Allstate provided a manual check with only the bodily-injury limits. Thus, its "acceptance" was not absolute and identical with the terms of the offer. As such, it was a legal nullity.

Therefore, this Court should reverse its holding, concluding instead that the mirror-image rule applies in this context and that Allstate's purported acceptance is a jury issue.

II. Assuming *arguendo* that Allstate's acceptance was valid, the Court impermissibly modified the contract.

"To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501–02 (Ct. App. 2007) (citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). Under such circumstances, "the court is not at liberty to consider [the parties'] secret intentions." *Ibid.* (quoting *Blakeley v. Rabon,* 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976), and *Ellie, Inc. v. Miccichi,* 358 S.C. 78, 93–94, 594 S.E.2d 485, 493–94 (Ct. App. 2004)).

As explained above, the Offer's requirement that Allstate provide a cashier's or certified check was a material term that was "perfectly plain" and unambiguous. However, this Court, following the trial court's lead, manufactured an ambiguity in order to examine the parties' alleged secret intentions and thus achieve a (seemingly) more equitable result. Furthermore, the Offer included (again, as explained above) a "perfectly plain," material demand for the property-damage limits. Yet this Court assumed that Goodwin did not actually make that demand, reasoning that because Goodwin demanded a release that did not "include . . . the release of property damage claims," she could not reasonably demand the property-damage limits as well.

But such decisions are outside of the Court's purview. In short, "a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction." *Lowcountry Open Land Tr. v. Charleston S. Univ.*, 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008). The Court must enforce agreements according to their terms, "regardless of [their] wisdom or folly," or "apparent unreasonableness." *Hook*, 439 S.C. at 73, 885 S.E.2d at 453–54.

Here, even if a contract exists, the Court decided the case by rewriting clear, material terms of the contract. This error, like the first, calls for reversal.

CONCLUSION

Allstate failed to accept Goodwin's Offer of Compromise; even if Allstate did accept the Offer, this Court was not at liberty to rewrite the parties' contract based on their alleged secret intentions. For these reasons, and for any other reason that may be evident from the record, this Court must reverse the trial court's order granting Allstate's motion for summary judgment and denying Goodwin's corresponding motion, and it must remand the case for a trial on the merits.

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Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM FLORENCE COUNTY
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Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-001108
Civil Action No. 2015-CP-16-00815

Allstate Fire and Casualty Insurance Company, Respondent,

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Pamela Goodwin, Appellant.

PROOF OF SERVICE

Pursuant to Rule 262(c), SCACR, I certify that I have served Appellant's Petition for Rehearing on Respondent by Electronic Mail on June 29, 2023, addressed to Respondent's attorneys of record, John Thomas Lay, Jr. and Alfred Johnston Cox of Gallivan, White & Boyd, PA.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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Petition for Rehearing - Allstate Fire v. Pamela Goodwin

1 message

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To: jlay@gwblawfirm.com, jcox@gwblawfirm.com
Cc: TeamJefferies <teamjefferies@poulinwilley.com>, Roy Willey <roy@akimlawfirm.com>, Eric Poulin <eric@akimlawfirm.com>, Tom Kyle <tom.kyle@poulinwilley.com>

Dear Mr. Lay, Jr. and Mr. Cox:

We hope this letter finds you well. Enclosed for service upon you is Appellant's Petition for Rehearing. Please let us know if you have any questions.

Sincerely,
--

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Staff Attorney
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POULIN | WILLEY ANASTOPOULO

2 attachments

Goodwin PFR.pdf
226K

CL to OC - Petition for Rehearing.pdf
112K

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June 29, 2023

VIA E-MAIL ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: *Allstate Fire v. Pamela Goodwin*
Case No.: 2018-001108

Dear Ms. Kitchings:

Attached for filing, please find Appellant's Petition for Rehearing and Proof of Service. A check in the amount of fifty (50) dollars for the filing fee is being mailed. Please let us know if you need any additional information.

Sincerely,

s/ Angeline Larrivee

Cc: John Thomas Lay, Jr.
Alfred Johnston Cox