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Jun 29 2023

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. 2018-001675
Civil Action No. 2017-CP-21-00341

Allstate Property and Casualty
Insurance Company,

Respondent,

v.

Natoshia Hamilton and Kenneth
Collins Coogler, Defendants,

of whom NATOSHIA HAMILTON
is the

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, Natoshia Hamilton, 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.**

STATEMENT OF FACTS

On January 31, 2015, a speeding driver rear-ended Appellant Natoshia Hamilton, seriously injuring her. (R. pp. 29-32; p. 64; p. 108, lines 12-21). Hamilton promptly retained the Anastopoulo Law Firm (“Law Firm”) to pursue her case. (R. p. 27).

On January 15, 2016, Law Firm sent Respondent Allstate (the at-fault driver’s insurer (R. pp. 18-19)) a time-limited Offer of Compromise requesting payment of the driver’s bodily-injury limits. (R. pp. 28-37). The Offer provided a clear and thorough explanation of its terms. (R. pp. 28-37). As relevant to this case, the Offer demanded payment in one of two possible ways: (1) a cashier’s check or (2) a certified bank check. (R. pp. 28-37).

Specifically, the Offer stated that “[s]ettlement funds must be paid by Cashier’s Checks or Certified Bank Checks (not drafts) issued by your insurance company as follows: Natoshia Hamilton and the Anastopoulo Law Firm, LLC” and that “[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.” (R. p. 33, p. 35 (emphasis in original)). Furthermore, the Offer repeatedly emphasized the importance of complying with all of its conditions. *See* R. p. 33 (emphasis in original) (“***If any condition is not met . . . this offer of***

compromise will be withdrawn”); R. p. 35 (“[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.”); R. p. 36 (emphasis in original) (“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”; ***“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. (R. p. 301, lines 1-3). So, Law Firm withdrew the Offer, returned Allstate’s check, and sued the at-fault driver. (R. p. 40).

On February 6, 2017, Allstate filed a declaratory-judgment action, asking 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. 16-23). About a year later, the parties filed competing motions for summary judgment. (R. pp. 49-53; pp. 77-80). On August 6, 2018, after a June 1 hearing, the trial court granted Allstate’s motion but denied Hamilton’s, holding that “Hamilton’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” and that “[t]he acceptance of the settlement demand . . . is valid and enforceable” (R. pp. 1-10). The court later denied Hamilton’s subsequent motion to reconsider. (R. p. 11).

Hamilton appealed on September 17, 2018. (R. p. 274). On May 24, 2023, this Court affirmed the trial court’s decision without oral argument. It held that “the form of the check was

not an essential or material term of [Hamilton'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 Hamilton could not "articulate an appropriate logical reason supporting the argument that the form of the check was essential or material to the parties' contract." (Opinion pp. 5-7). Significantly, even though Hamilton focused throughout the proceedings on Allstate's failure to accept her Offer under the mirror-image rule,¹ the Court relegated that argument to a footnote and summarily dismissed it.

As a logical consequence of these holdings, the Court held "that Allstate complied with the essential and material terms of Hamilton's offer."

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)).

¹ Of course, this issue is part and parcel of Hamilton's argument in her brief (Appellant's Brief pp. 10-13), but Hamilton also raised the issue in her Motion for Summary Judgment (R. pp. 52-53); in the summary-judgment hearing (R. p. 295, line 1-p. 305, line 21); and in her Motion to Reconsider (R. pp. 255-58).

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 “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)).² 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

² 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.

(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 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.”).³

³ 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

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 Hamilton’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).

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 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.”)

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 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 Hamilton 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).

Beyond this specific requirement, the Offer repeatedly emphasized the necessity of conforming to all requirements listed. But Allstate provided a manual check, not a cashier’s or certified check. 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 achieve a (seemingly) more equitable result.

But such a decision is 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, apparent unreasonableness, or the parties' failure to guard their rights carefully." *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 a clear, material term of the contract. This error, like the first, calls for reversal.

CONCLUSION

Allstate failed to accept Hamilton'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 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 Hamilton's corresponding motion, and it must remand the case for a trial on the merits.

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Respectfully submitted,

POULIN | WILLEY | ANASTOPOULO, LLC

s/ Angeline M. Larrivee

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Allstate Property and Casualty
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of whom NATOSHIA HAMILTON is
the

Appellant.

PROOF OF SERVICE

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

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

POULIN | WILLEY | ANASTOPOULO, LLC

s/ Angeline M. Larrivee

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Petition for Rehearing - Allstate Property v. Natoshia Hamilton

1 message

Angeline Larrivee <angeline.larrivee@akimlawfirm.com>

Thu, Jun 29, 2023 at 12:04 PM

To: jcox@gwblawfirm.com

Cc: Roy Willey <roy@akimlawfirm.com>, Eric Poulin <eric@akimlawfirm.com>, Tom Kyle <tom.kyle@poulinwilley.com>

Dear 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,

--

Angeline Larrivee

Staff Attorney



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**Transportation & Insurance
Liability Division**

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 Property v. Natoshia Hamilton*
Case No.: 2018-001675

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: Alfred Johnston Cox

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