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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-000856
Civil Action No. 2018-CP-04-02003

Debra O'Conner, as Personal Representative of the Estate of Sandy Lynn Shook, Appellant,

v.

Aaron Collier, Respondent.

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, Debra O'Conner as Personal Representative of the Estate of Sandy Lynn Shook, respectfully submits this Petition for Rehearing under Rule 221, SCACR.

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT

I. The Court erred in failing to apply the mirror-image rule to contract formation in the settlement-agreement context.

STATEMENT OF FACTS

On July 22, 2017, a motorcycle driver was involved in a single-vehicle accident that killed his passenger, Sandy Lynn Shook. (R. p. 12; p. 33). Shook's estate promptly retained the Anastopoulo Law Firm ("Law Firm") to pursue her case. (R. p. 18).

On September 26, 2018, Law Firm sent Respondent Progressive (the at-fault driver's insurer (R. p. 33)) a time-limited Offer of Compromise requesting payment of the driver's bodily-injury and property-damage limits. (R. pp. 23-32). The Offer provided a clear and thorough explanation of its terms. (R. pp. 23-32). As relevant to this case, the Offer repeatedly emphasized the deadline for compliance. The Offer referred at least twelve times to the deadline or the demand's time-limited nature. *See, e.g.*, R. p. 28 ("**THIS OFFER OF COMPROMISE INCLUDES A TIME-LIMITED DEMAND . . . AND, AT 5:00 P.M. EDT ON OCTOBER 12, 2018, THIS OFFER WILL BE WITHDRAWN . . . .** "); R. P. 32 n.8 ("Failure to meet the deadline for any reason will be a rejection of this offer of compromise and will result in the immediate and permanent withdrawal of this offer of compromise."). The Offer also clarified that Progressive would need to send the funds to a particular address: 32 Ann Street, Charleston, SC 29403. (R. p. 28).

Relatedly, the Offer persistently stressed the importance of complying with all of its conditions. *See, e.g.,* R. p. 28 ("***If any condition is not met . . . this offer of compromise will be withdrawn . . . .***"); R. p. 30 ("[I]f your insurance company's actions and documents (i.e., your

proposed Covenant, 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 . . . ."); 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, Progressive issued and delivered a check solely for the bodily-injury limits. (R. p. 106, line 19-p. 108, line 3). After the deadline in the Offer of Compromise had passed, Progressive attempted to deliver an additional check for the property-damage limits. (R. p. 45; p. 107, line 24-p. 108, line 4). It delivered both checks to Law Firm's North Charleston address, not the address that the Offer required. (R. p. 45). Law Firm withdrew the Offer, returned Progressive's check, and sued the at-fault driver. (R. p. 42; p. 108, lines 10-12).

On February 4, 2019, Progressive filed a Motion to Enforce Settlement. (R. pp. 9-11). Regarding the missing policy limits, it alleged that its "claims representative inadvertently left the second check . . . out of the packet of materials that were hand delivered to Anastopoulo Law Firm." (R. p. 10). It did not discuss its failure to deliver either check to the required address. (R. pp. 9-11).

On April 8, 2019, after a March 20 hearing, the trial court granted Progressive's motion, holding in relevant part that "there was a meeting of the minds"; that "[t]he failure to deliver the second check . . . by the arbitrary deadline . . . was an inadvertent mistake that was a product solely of human error, and not a counter offer to the plaintiff's demand"; and that "[t]he failure to deliver

the second check to the . . . office location specified in the footnotes of the 'Offer to Compromise' was an inadvertent mistake that was a product solely of human error and was not a counter offer to the plaintiff's demand." (R. pp. 3-4). The court later denied Appellant Debra O'Conner's subsequent Motion to Reconsider. (R. pp. 6-8).

O'Conner appealed on May 20, 2019, and oral argument took place on May 11, 2021. Two years later, on May 24, 2023, this Court affirmed the trial court's decision. In doing so, it held that Progressive's "attempt[] to comply with the demand letter's essential terms *before the settlement deadline* evidenced Progressive's assent to the essential and material terms of O'Conn[e]r's offer of compromise"; therefore, its "failure to deliver the second $25,000 check within the deadline was a good-faith mistake, not a rejection or counteroffer." (Opinion p. 5). In essence, this Court held that although Progressive did not technically comply with the Offer, its attempt to accept operated as an actual acceptance. Regarding the address, this Court "[found] that given the sixteen-day period in which Law Firm demanded acceptance with the letter's numerous demands, the mailing address provided in the demand letter was not a material term of the offer of compromise." (Opinion p. 6).

In its opinion, however, the Court failed to address the mirror-image rule—an issue which was at the heart of O'Conner's argument throughout the proceedings. *See, e.g.,* R. p. 58; pp. 84-86.

This Petition for Rehearing follows.

STANDARD OF REVIEW

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Miller v. Dillon*, 432 S.C. 197, 206, 851 S.E.2d 462, 467 (Ct. App. 2020) (quoting *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (Ct. App. 2012)). "An action to construe a contract is an

action at law," and "[i]n an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings." *Ibid.* (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). However, "[t]his [c]ourt reviews all questions of law de novo." *Ibid.* (quoting *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017) (second alteration in original)).

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)).[1] 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 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.").[2]

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[1] 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.

[2] 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.*

Despite these longstanding principles, this Court dismissed the mirror-image rule without a word.

From a certain standpoint, the Court's failure to address the issue makes sense. As our Supreme Court has noted, the mirror-image rule has "rather severe consequences." *Columbia Hyundai*, 326 S.C. at 80–81, 484 S.E.2d 468 at 469. Therefore, certain statutory provisions have "abrogated" those consequences to a degree—regarding the sale of goods. *See ibid.*; *Weisz*

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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***." 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.")

Graphics Division of Fred B. Johnson Co., v. Peck Industries, Inc., 304 S.C. 101, 106–07, 403 S.E.2d 146, 149 (Ct. App. 1991); S.C. Code Ann. §§ 36-2-102, -207.

But these statutory provisions, which mitigate the consequences of the common-law rule, only serve to highlight the singular nature of transactions in goods. They (and the cases which discuss them) 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.

About three years ago, this Court addressed an analogous issue. In *Miller*, the Court affirmed the lower court's decision to deny a motion to enforce a settlement agreement. 432 S.C. at 202, 851 S.E.2d at 465. It found that the appellant failed to fulfill the "eighteen detailed terms" of the settlement agreement, where there was "a discrepancy between [the document] she was required to provide under the agreement and what she did provide." *Id.* at 203–04, 210, 851 S.E.2d at 466, 469. Specifically, as the appellant admitted, she failed to obtain a required signature because "[t]he deadline was a Saturday" and she did not receive the signature until the following Monday. *Id.* at 210, 851 S.E.2d at 469. During a hearing, she argued that "in substance [she] lived up to the term[s] of the agreement," and that because of her efforts, she "simply want[ed] an opportunity" to follow through with the agreement. *Ibid.*

The Court rejected the appellant's argument of substantial compliance, determining that the provided document "was not compliant with the mandate of the settlement agreement." *Ibid.* In effect, the Court found that even though the appellant attempted to comply with the settlement agreement, an attempt—even a good-faith, significant attempt—was not enough. The appellant needed to successfully comply with every term of the settlement agreement.

Here, similarly, Progressive's purported acceptance was not an acceptance at all. The Offer repeatedly underscored its time-limited nature, the deadline, and the necessity of conforming to all requirements listed. But Progressive did not provide the funds by the deadline, and it did not transmit the funds to the required address. Thus, Progressive's "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 Progressive's purported acceptance is a jury issue.

CONCLUSION

Because Progressive failed to accept O'Conner's Offer of Compromise, and for any other reason that may be evident from the record, this Court must reverse the trial court's order granting Progressive's Motion to Enforce Settlement.

Respectfully submitted,

POULIN | WILLEY | ANASTOPOULO, LLC

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APPEAL FROM ANDERSON COUNTY
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R. Lawton McIntosh, Circuit Court Judge

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Civil Action No. 2018-CP-04-02003

Debra O'Conner, as Personal Representative of the Estate of Sandy Lynn Shook, Appellant,

v.

Aaron Collier, Respondent.

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 July 15, 2023, addressed to Respondent's attorneys of record, Michael T. Coulter and Michelle N. Endemann of Clarkson, Walsh & Coulter, P.A.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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Debra O'Conner v. Aaron Collier // 2019-000856

1 message

Angeline Larrivee <angeline.larrivee@akimlawfirm.com> Sat, Jul 15, 2023 at 7:53 PM
To: upstatecoulter@clarksonwalsh.com, mendemann@clarksonwalsh.com
Cc: Roy Willey <roy@poulinwilley.com>, Eric Poulin <eric@akimlawfirm.com>, Tom Kyle <tom.kyle@poulinwilley.com>

Dear Mr. Coulter and Mrs. Endemann:

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

Sincerely,
--

Angeline Larrivee
Staff Attorney
800-313-2546 Charleston
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3 attachments

- **CL to OC - PFR and Extension.pdf** 157K
- **Petition for Rehearing.pdf** 231K
- **Motion for Extension.pdf** 71K

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*OF COUNSEL

July 15, 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: *Debra O'Conner, as Personal Representative of the Estate of Sandy Lynn Shook, v. Aaron Collier*
Case No.: 2019-000856

Dear Ms. Kitchings:

Attached for filing, please find Appellant's Petition for Rehearing, Motion for Extension, and Proofs of Service. Two checks of fifty (50) dollars each are being mailed for the filing fees. Please let us know if you need any additional information.

Sincerely,

s/ Angeline Larrivee

Cc: Michael T. Coulter
Michelle N. Endemann