STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Case No. 2017-CP-21-341
Appeal No. 2018-001675

Allstate Property and Casualty Insurance Company..... Respondent,

v.

Natoshia Hamilton and Kenneth Collins Coogler, Defendants,
of Whom Natoshia Hamilton is the Appellant.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Allstate filed a declaratory judgment action on February 6, 2017 seeking to enforce a settlement that was allegedly reached between Appellant Natoshia Hamilton ("Hamilton") and Allstate Property and Casualty Insurance Company ("Allstate"). Specifically, Allstate's Complaint sought a declaration from the circuit court that Allstate's acceptance of Hamilton's time-sensitive Offer of Compromise (the "demand" or "Offer") resulted in a valid and enforceable settlement agreement. Counsel for Hamilton accepted service on her behalf and filed an Answer to Allstate's Complaint on March 2, 2017. In her Answer, Hamilton argued that Allstate failed to satisfy all the conditions precedent to Allstate's performance under the Offer of Compromise and, therefore, no valid and enforceable settlement agreement was reached.

Hamilton filed a Motion for Summary Judgment and Memorandum of Law in Support of Summary Judgment ("Hamilton's Motion") on January 22, 2018, contending that the Offer of Compromise requested payment of the bodily injury policy limits by way of a certified or cashier's check and, because Allstate did not comply with those terms but instead issued a manual check, she was entitled to entry of summary judgment and an Order declaring that no valid, enforceable settlement agreement existed. Allstate filed its Motion for Summary Judgment ("Allstate's Motion") on February 7, 2018, arguing that Allstate complied with the material terms of the Offer of Compromise such that summary judgment should be granted in its favor and entitled to an Order declaring the settlement agreement valid and enforceable. On June 7, 2018, Allstate filed a Memorandum of Law in Support of its Motion for Summary Judgment ("Allstate's Memo in Support").

The circuit court heard oral argument of the parties on their competing Motions for Summary Judgment on June 1, 2018. After hearing oral argument, the circuit court granted Allstate's Motion and denied Hamilton's Motion by Order dated August 7, 2018. R. pp. 1 – 10. In granting Allstate's Motion and denying Hamilton's Motion, the Court found (1) Hamilton's demand that Allstate issue a certified or cashier's check in payment of the claim was not a material term of the settlement; (2) Allstate complied with the Offer and the settlement was valid and enforceable; (3) Allstate fulfilled its obligations under the policy when it settled Hamilton's claim for the bodily injury limits of the policy; and (4) because the settlement agreement was valid and enforceable, Hamilton was directed to execute the Covenant Not to Execute provided by Allstate upon receipt of the check from Allstate in resolution of her claims for bodily injury arising from the January 31, 2015 collision. R. pp. 9-10.

In its Order, the circuit court found that the "essential and material terms" of Hamilton's Offer was the payment of the entire $25,000 bodily injury limits. R. pp. 6 - 8. It ruled that the form of payment was not a material or essential term of the Offer. *Id.* Relying on South Carolina Rule of Professional Conduct 1.15, the circuit court held that the South Carolina Supreme Court "has already determined that payment in the form of a cashier's check or certified check is not an essential or material term of a settlement agreement." R. pp. 7-8. Put differently, the Court found that "the manual check issued by Allstate is treated the same as a certified check or a cashier's check under South Carolina law." R. p. 8.

On August 20, 2018, Hamilton filed a Motion to Reconsider (Hamilton's Motion to Reconsider). The circuit court denied Hamilton's Motion to Reconsider by written order on August 30, 2018. R. pp. 11 – 13. Hamilton filed her Notice of Appeal on October 12, 2018.

STATEMENT OF FACTS

The dispute arose from a motor vehicle collision that occurred between Hamilton and Kenneth Coogler on January 31, 2015. Defendant Hamilton sustained injuries, and thereafter retained the Anastopoulo Law Firm, LLC ("ALF") to represent her. On January 15, 2016, Hamilton's counsel sent a time-limited Offer of Compromise (The "demand" or "Offer") to Allstate requesting payment of the applicable bodily injury policy limits. R. pp. 28 – 37; 119 - 208. The Offer demanded that the payment of the bodily injury limits be paid **only** via cashier's check or certified bank check, and that failure to make payment as requested would result in the immediate and permanent withdrawal of the Offer. *Id.* The Offer reiterated that payment by any method other than that demanded constituted a counteroffer and rejection of the Offer of Compromise. *Id.* Specifically, the Offer of Compromise stated:

> "Settlement funds must be paid by Cashier's Checks or Certified Bank Checks (not drafts)..."(emphasis in original);..."Payment must be made as described herein, and payment by any other method....will not satisfy the terms of this offer of compromise and will result in the immediate and automatic withdrawal of this offer of compromise...our offer of compromise must be accepted unequivocally and without variance of any sort and that a purported acceptance of this offer which imposes or even requests conditions beyond those contained in this offer will be construed as a counteroffer and rejection...Additionally, any attempted counteroffer by Allstate Insurance Company will be deemed a rejection of our offer of compromise and will result in the immediate and permanent withdrawal of our offer of compromise...Our offer of compromise must be accepted by your insurance company's performance of the requirement of this letter and not by mere words that claims to accept the offer...if 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. Accordingly, in 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 and a proposed Release that comply with the terms of this offer of compromise." (emphasis in original)... "***If any condition or requirement is not met by the specified deadline or if any additional condition or requirement is imposed upon Natoshia Hamilton, then there has been no acceptance and no agreement.***" (emphasis added).
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> R. pp. 33 – 35.

In response to Hamilton's Offer, Allstate tendered the bodily injury limits via a hand written, non-certified, "manual" check. It is undisputed that the non-compliant check was timely delivered. Because Allstate did not meet the clear, unambiguous terms of Defendant's Offer and, in doing so, proposed a counteroffer, the Offer was withdrawn and the settlement documents and manual, non-certified check were returned to Allstate. In the correspondence returning the check, Hamilton's counsel informed Allstate that it failed to accept Hamilton's Offer of Compromise and that suit was filed against Mr. Coogler. R. p. 40. That lawsuit was filed in the Florence County Court of Common Pleas on April 4, 2016 and assigned case number 2016-CP-21-835.

STANDARD OF REVIEW

Summary judgment is "an extreme remedy to be cautiously invoked." *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56, SCRCP. When reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the trial court. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C 334, 340, 611 S.E.2d 485, 488 (2005). An appellate court may decide questions of law with no particular deference to the trial court. *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010). "On appeal from an order granting summary

judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING ALLSTATE'S MOTION FOR SUMMARY JUDGMENT AND DENYING HAMILTON'S MOTION FOR SUMMARY JUDGMENT

The circuit court's determination that the purported "settlement agreement" was valid and enforceable constitutes reversible error because (1) Allstate failed to comply with the clear, unambiguous terms of the Offer, which required that the bodily injury limits be tendered only by certified or cashier's checks; and (2) the method of payment is a material and essential term of the Offer. The circuit court's Order should be overturned and the case remanded for trial.

A. Because Allstate Failed to Tender a Certified Or Cashier's Check, Allstate did Not Comply with the Terms of the Offer or Enter into an Enforceable Contract with Hamilton

The question before this Court is whether Allstate complied with Hamilton's Offer and entered into a valid, binding, and enforceable settlement agreement with her. As detailed below, because no binding contract was entered into between the parties, the circuit court erred in granting Allstate's Motion for Summary Judgment and Denying Hamilton's Motion for Summary Judgment.

In South Carolina, settlement agreements are viewed as contracts. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). Therefore, general contract principles are applied in the construction of a settlement agreement. *Id.* South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Hughes*

v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975); *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

When "an agreement is clear and capable of legal construction, the courts [sic] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Messer v. Messer*, 359 S.C. 614, 628, 598 S.E.2d 310, 317 (Ct. App. 2004). When an agreement is plain and unambiguous, the court does ***not*** have the authority to modify its terms. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007). "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976). It is only when the language of a settlement agreement is susceptible to more than one interpretation that the court has the duty to ascertain the intention of the parties. *Mattox v. Cassady*, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986).

i. The Circuit Court's Order Ignores the Plain, Unambiguous Language of the Offer

The circuit court's Order amounts to a re-writing of Hamilton's contractual Offer to Allstate. "Generally, parties are free to contract to anything as long as it is not illegal, unconscionable, or against the public interest." *Bicycle Transit Authority, Inc. v. Bell*, 333 S.E.2d 299, 305 (N.C.1985). Allstate does not argue that the contractual Offer presented to it was invalid on any of those grounds. Instead, knowing that Hamilton's Offer was wholly unambiguous and abundantly clear, Allstate essentially asked the Court to reform the contract to suit its own purposes and force Hamilton to accept a settlement offer she never made.

It is outside of the province of the circuit court to take such action. Indeed, "[i]t is fundamental that ***courts enforce contracts and do not rewrite them***." *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 157, 468 N.Y.S.2d 649, 654 (1983) (internal citations omitted)(emphasis added). "The courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Morlee Sales Corp. v. Manufacturers Tr. Co.*, 9 N.Y.2d 16, 19, 172 N.E.2d 280, 518 (1961)(internal citations and quotations omitted). Where the intention of the parties is unambiguously set forth in the agreement itself, effect must be given to the intent as indicated by the language used without regard to extrinsic evidence – the subjective intent of the parties is irrelevant. *Mallad Const. Corp. v. Cty. Fed. Sav. & Loan Ass'n,* 32 N.Y.2d 285, 298 N.E.2d 96 (1973). There can be no doubt that "the best evidence of what the parties intended is what they say in their writing." *In re World Trade Ctr. Disaster Site Litig.*,754 F.3d 114 (2d Cir. 2014).

Here, the language of the Offer could not be clearer. As stated above, the Offer goes to great and even repetitive lengths to inform Allstate that payment is to be made by Cashier's Check or Certified Check only, and that any modification to the terms set forth in the offer constitutes a counteroffer and complete rejection of the offer extended to Allstate. To be sure, Defendant Hamilton's Offer instructs that:

- "Settlement funds must be paid by Cashier's Checks or Certified Bank Checks (not drafts)..." R. p. 33.
- "Payment must be made as described herein, and payment by any other method....will not satisfy the terms of this offer of compromise and will result in the immediate and automatic withdrawal of this offer of compromise." R. p. 35.

- "...[O]ur offer of compromise must be accepted unequivocally and without variance of any sort and that a purported acceptance of this offer which imposes or even requests conditions beyond those contained in this offer will be construed as a counteroffer and rejection..." R. p. 35.
- "Additionally, any attempted counteroffer by Allstate Insurance Company will be deemed a rejection of our offer of compromise and will result in the immediate and permanent withdrawal of our offer of compromise...Our offer of compromise must be accepted by your insurance company's performance of the requirement of this letter and not by mere words that claims to accept the offer...if your insurance company's actions and documents (i.e., your proposed release, settlement check, etc.) do not comply with our offer of comprise, it will be a counteroffer and rejection of our offer. R. p. 35
- Accordingly, in 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 and a proposed Release that comply with the terms of this offer of compromise." R. p. 35.
- "***If any condition or requirement is not met by the specified deadline or if any additional condition or requirement is imposed upon Natoshia Hamilton, then there has been no acceptance and no agreement.***" R. p. 36.

By accepting Allstate's argument, the circuit court ignored the plain and unequivocal language of the Offer. It ignores the intent of the Offeror. The circuit court's Order fundamentally re-writes Defendant Hamilton's Offer, completely excising the explicit language quoted above in contravention of long-standing contract principles. Accordingly, Defendant Hamilton respectfully submits that the circuit court committed reversible error.

ii. The Form of Payment is a Material Term of the Offer

In support of its finding that Allstate accepted Defendant Hamilton's Offer, the circuit court cited to Rule 1.15, RPC, Rule 407, SCACR for the contention that the form of payment is not an essential or material term of a settlement agreement. As a threshold matter, the Court is not the arbiter of what is a material term of a settlement offer or contract. Indeed, the offeror is the master of the offer; put differently, it is the offeror that decides and controls what terms are material. Further, and contrary to Allstate's argument and the Court's Order, Rule 1.15 does ***not*** state that there is "no material difference between a check issued by an insurance company, such as Allstate, and a certified check, cashier's check, or other check drawn by a depository institution."[1]

Rule 1.15, also known as the safekeeping rule, allows a lawyer to disburse funds from its trust account to a client in limited circumstances as set forth in subsection (f)(2), such as when a check is certified, is a cashier's check or, in the case of a check issued by a depository institution or insurance company, the amount does not exceed $50,000.00 However, the Rule does ***not*** require a lawyer to negotiate nor disburse a check to a client in those limited circumstances. The language of Rule 1.15(f)(2) is permissive; it does not place any affirmative obligation on the attorney to disburse funds under such circumstances.

More importantly, Rule 1.15 explicitly states that by disbursing such a check, the lawyer does so at his own risk. "Notwithstanding Subsection (f)(1) above, a lawyer may disburse funds from a trust account ***at the lawyer's risk*** [in reliance to the circumstances set forth in (f)(2)(iv)...]" Rule 1.15(f)(2), RPC, Rule 407, SCACR (emphasis added). The comments to Rule 1.15 take a

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[1] Despite the language in its Order, the circuit court judge, during the oral arguments of these Motions, did correctly note that "there probably is a material difference...[T]here is a difference between a draft and certified funds..." (Hearing Transcript, p.11).

more explicit tone in issuing its warnings to lawyers seeking to disburse funds pursuant to subsection (f)(2). According to Rule 1.15, RPC, Rule 407, SCACR, cmt. 7:

> Subsections (i) through (vi) of Rule 1.15(f)(2) represent categories of trust account deposits which carry a limited ***risk of failure*** so that disbursements may be made in reliance on such deposits without violating the fundamental rule of disbursing only on collected funds.
>
> ***In any of those circumstances, however, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement.***
>
> ***The lawyer's risk includes deposited instruments that are forged, stolen, or counterfeit. If any of the deposits fail for any reason, the lawyer, upon receipt of notice or actual knowledge, must promptly act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such items personally pays the amount of any failed deposit within five (5) business days of receipt of notice that the deposit has failed, the lawyer will not be considered to have committed professional misconduct based upon the disbursement of uncollected funds.***

Further, Rule 1.15, RPC, Rule 407, SCACR, cmt. 6 warns a lawyer that while "deposited funds of various types may be made 'available' for immediate withdrawal by the depository institution...lawyers should be aware that 'available funds' are not necessarily collected funds since the credit given for the available funds may be revoked if the deposited item does not clear."

If the members of the South Carolina bar were to follow the letter of the circuit court's Order and act as though there is no material difference between a certified check, cashier's check, and a check issued by an insurance company or other depository institution when deciding to disburse funds, then this state's attorneys would be opening themselves up to extensive risks. No attorney should be mandated to expose themselves to an ethical complaint or malpractice suit by ignoring the differences between these negotiable instruments.

In fact, if one reads the plain language of Rule 1.15 and its comments, the reader will see that there ***are*** material differences between certified checks, cashier's checks, and those issued by insurance companies or other depository institutions. While certified checks and cashier's checks can be relied on regardless of the amount pursuant to Rule 1.15, the same cannot be said for those issued by insurance companies or other institutions, which have a limit of $50,000.00. In setting forth this difference, Rule 1.15 is stating that there is in fact a material difference between these types of instruments. The circuit court therefore committed reversible error in finding that the form of payment is not a material term of the Offer.

CONCLUSION

For the foregoing reasons, Appellant respectfully argues that the circuit court's Order granting Allstate's Motion for Summary Judgment and denying Hamilton's Motion for Summary Judgment constitutes reversible error, and prays that the case be remanded to the Circuit Court for a trial on the merits.

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Respectfully Submitted,

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August 15, 2019

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CERTIFICATE OF COUNSEL

Counsel for Appellant Natoshia Hamilton certifies that the Final Brief served and filed herewith complies with Rule 211(b), SCACR.

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