THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2018-001108
Civil Action No. 2015-CP-16-0815

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

v.

Pamela Goodwin,..... Appellant,

FINAL BRIEF OF APPELLANT PAMELA GOODWIN

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STATEMENT OF JURISDICTION

This appeal arises out of an Order of the Circuit Court granting Respondent's Motion for Summary Judgment and Denying Appellant's Motion for Summary Judgment.

The Trial Court's final judgment was entered on March 22, 2018. Appellants filed a Notice of Appeal on June 6, 2018. This Court has jurisdiction to entertain the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF ISSUES ON APPEAL

I. **Did the Circuit Court err in Granting Respondent's Motion for Summary Judgment in finding that Respondent's issuance of a manual check in response to Appellant's offer of compromise constituted a valid and enforceable settlement agreement between the parties?**

II. **Did the Circuit court err in Granting Respondent's Motion for Summary Judgment in finding that Respondent's tender of only the bodily injury limits in response to Appellant's offer of compromise constituted a valid and enforceable settlement agreement between the parties?**

STATEMENT OF THE CASE

This offer/acceptance contractual dispute originates from an August 2014 automobile versus motorcycle collision in Darlington County. The collision involved Defendant and Plaintiff's insured, Helen Metrotol-Ham. Due to Defendant's injuries, Defendant's counsel sent a time-limited offer of compromise to Plaintiff requesting payment of all applicable limits. In this circumstance, Ham's liability limits were $50,000 in bodily injury and $50,000 in property damage. The offer required payment of the policy limits by "Cashier's Checks, or Certified Bank Checks (not drafts) ..." (R., p. 558) In response, Plaintiff only tendered Ham's bodily injury limits and a hand-written, "manual" check. Since Plaintiff did not meet the terms of Defendant's offer, the settlement documents and $50,000 bodily injury manual, non-certified check were returned to Plaintiff. Defendant later filed suit against Ham in the Darlington County Court of

Common Pleas, which was assigned case number 2015-CP-16-0001. Plaintiff filed its Amended Complaint for Declaratory Judgment ("DJ") action on November 19, 2015, in the Darlington County Court of Common Pleas. In its DJ, Plaintiff sought a declaration that it fulfilled its obligations under its policy and Defendant's Offer. (R., p. 17-18) Defendant filed a Motion for Summary Judgment on December 7, 2017. (R., p. 53) Plaintiff filed a Motion for Summary Judgment on December 18, 2017. (R., p. 84) The Trial Court's final judgment granting Plaintiff's Motion for Summary Judgment was entered on March 22, 2018. (R., p. 1) On April 16, 2018, Defendant filed a Motion to Reconsider the granting of Plaintiff's Motion to Reconsider. (R., p. 374) The Trial Court found it unnecessary to hear oral arguments and Denied Defendant's Motion to Reconsider on May 15, 2018. Appellants filed a Notice of Appeal on June 6, 2018.

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). This Court therefore has the authority to review this question presented *De Novo*.

ARGUMENT

I. Appellant's demand that Respondent issue a certified or cashier's check in payment of the claim was not complied with by Respondent, and therefore prevented contract formation and prohibited the circuit court from enforcing an agreement between the parties.

As a preliminary matter, 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.* "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). 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). 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). "The intentions of the parties to a settlement agreement must be determined as far as possible from the terms of the contract and once determined, they must be given effect by the court." *Kane v. Kane*, 280 S.C. 479, 481, 313 S.E.2d 327, 329 (Ct. App. 1984).

"Nothing is better settled than that in order to constitute a contract there must be an offer on one side and an unconditional acceptance on the other." *Sossaman v. Littlejohn*, 241 S.C. 478, 485-86, 128 S.E.2d 124, 127 (1963) (quoting *Cohn v. Penn. Beverage Co.*, 313 Pa. 169 A. 768). It is well established that, in order to constitute a contract, "the acceptance of the offer *must be absolute and identical* with the terms of the offer. *Id.* Thus, if one party offers another party to do a definite thing, and that other party accepts conditionally or proffers a new term into the acceptance, his answer is nothing more than a counter proposal. *Id.* (holding that the time and manner of payment on a contractual obligation is a material part of a transaction, and where plaintiff proposed his alleged acceptance conditions other than cash upon delivery was a counter proposal, not a contractual acceptance); *see also* Restatement (Second) of Contracts § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."). "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." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

The Fourth Circuit Court in the case of *Ozyagcilar v. Davis*, 701 F.2d 306 (4th Cir. 1983) noted that "although the district court had the power to enforce complete settlement agreements, it does not have the power to impose, in the role of arbiter, a settlement agreement where there

was never a meeting of the parties' minds." *Ozyagcilar*, 701 F.2d at 308. The Court noted that "where there has been no meeting of the minds sufficient to form a complete settlement agreement, any partial performance of the settlement agreement must be rescinded and the case restored to the docket for tiral." *Id.* The Fourth Circuit found "the district court erred by not conducting a hearing to determine whether there had been a meeting of the minds as to the settlement agreement, and if so, to determine the terms and conditions of the settlement agreement." *Id.* As previously stated, the circuit court's role in determining the actual terms of the settlement agreement between the parties is similar to the court's role in interpreting the terms of a contract. *Id.* However, it is clear that the district court only retains the power to enforce complete settlement agreements; it does not have the power to impose, in the role of a final arbiter, a settlement agreement where there was never a meeting of the parties' minds. *Wood v. Virginia Hauling Co.*, 528 F.2d 423, 425 (4th Cir. 1975). Where there has been no meeting of the minds sufficient to form a complete settlement agreement, any partial performance of the settlement agreement must be rescinded and the case restored to the docket for trial. *Id.* The Fourth Circuit Court in *Ozyagcilar* reversed and remanded, holding that "the proper role of the district court in enforcing settlement agreements was made clear in *Wood*. There, in remanding a similar case to the district judge, we described his role as "to find, if he can the terms of the complete settlement agreement, or to determine that there was none." *Id.* (emphasis in original). Thus, it is improper for the district court, by its own motion or by agreement of the parties, to place itself in the role of a "final arbiter" of a settlement agreement. *Id.* Instead, on remand, the district court should, after a plenary hearing, determine if there was a settlement agreement between the parties and, if so, its terms and conditions." *Id.* 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 Trust Co.*, 9 N.Y.2d 16, 19, 210 N.Y.S.2d 516, 172 N.E.2d 280 (internal citations and quotations omitted). Where the intention of the parties is clearly and 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 Construction Corp. v. County Fed. Sav. & Loan Assoc.*, 32 N.Y.2d 285, 344 N.Y.S.2d 925, 298 N.E.2d 96. 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).

In interpreting contracts, the court should ascertain and give legal effect to the parties' intentions. *Gilbert v. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003) ("The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the lease."). Where the language of the contract is clear and unambiguous, the court must construe the contract according to the terms the parties used as understood in their plain, ordinary, and popular sense. *Schulmeye v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). The court's duty "is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or [the parties'] failure to guard their rights carefully,". *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584, 587 (1988) (internal quotation marks and citation omitted). "An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns,

the recipient's rejection of an offer leaves the matter as if no offer had ever been made." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 81, 133 S. Ct. 1523, 1533, 185 L. Ed. 2d 636 (2013) (Justice Thomas).

At the very heart of this case is the question of whether Respondent, by issuing a "manual" check and not a cashier's check or a certified check, complied with the terms of the Appellant's offer and whether the circuit court had the authority to enforce a settlement agreement between the parties absent that compliance. The purpose of the DJ was to determine whether or not Respondent had complied with and met the terms of Appellant's offer of compromise. Appellant's offer was not for goods; rather, it was for tender of all applicable policy limits in the form of a certified or cashier's check, which very clearly and repeatedly included the required tender of all bodily injury and property damage limits. Appellant's offer of compromise states, on page 6 in underlined text, "Payment must be made as described herein, and payment by any other method, including payment through the registry of any court or through the filing of an interpleader action, 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. 560) Additionally, the offer of compromise specifically states, on page 7, "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. 561) The offer of compromise very clearly expressed the manner in which payment was to be tendered.

It is clear that, as a matter of law, and in accordance with our Supreme Court in *Sossaman*, the form of payment in an offer is a material term. Appellant specifically required payment of the policy limits by "Cashier's Checks, or Certified Bank Checks (not drafts) ..."

(R., p. 558) The language of the offer could not be clearer. The Offer goes to great lengths and pains to inform Respondent 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 Respondent. Because Respondent's purported acceptance contained conditions other than a cashier's check or certified check, its delivery of a manual check that did not include full bodily injury and property damage limits was a counteroffer and not a contractual acceptance. It attempted to impose new conditions not contemplated in the offer and constituted a counter proposal as to a material term of the offer, to which Appellant was required to assent before there could be a meeting of the minds between the parties. Respondent essentially asked the Trial Court to reform the offer to suit its own purposes and force Appellant to accept a settlement offer that was never made. Such an imposition would be outside the province of the Court as the settlement agreement is not susceptible of more than one interpretation. Respondent is effectively attempting to eviscerate the common law mirror image rule and 200 years of South Carolina contract law by claiming that it met the terms of Appellant's offer to compromise. The facts lead to only one inescapable conclusion: a binding contract never formed between the parties as the Respondent's manual check never met the essential and material terms of Appellant's offer of compromise. Therefore, the Trial Court erred in concluding that Respondent complied with Appellant's offer and that a binding contract formed.

II. Appellant's demand that Respondent tender all applicable policy limits was not complied with by Respondent, and therefore prevented contract formation and prohibited the circuit court from enforcing an agreement between the parties.

The majority of the caselaw set forth above is equally applicable to the argument made here. As articulated by the Court in *Sossaman*, "the acceptance of the offer *must be absolute and identical* with the terms of the offer". *Sossaman*, 241 S.C. at 486. As Justice Thomas stated in *Genesis Healthcare Corp.*, "an unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect." *Genesis Healthcare Corp.*, 569 S.C. at 81. The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. *McClintock v. Skelly Oil Co.*, 232 Mo.App. 1204, 114 S.W.2d 181 (Mo. App. 1938). A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App..2007).

At issue here is the question of whether Respondent, by only tendering the bodily injury limits, complied with the terms of the Appellant's offer and whether the circuit court had the authority to enforce a settlement agreement between the parties absent that compliance. Appellant's offer of compromise included and repeatedly and fully conveyed that tender of all applicable policies was required, including bodily injury and property damage limits. (R., p. 558) This was not a request; it was a requirement as a material term of the offer. Appellant's offer of compromise states in pertinent part on page 4, "we require payment of the policy limits of all

applicable policies..." and on page 7, "this offer relates only to personal injury and property damages claims". (R., p. 558 and 561) At the time of Respondent's delivery of a manual check, the applicable property damage limits on the policy were not tendered, and therefore Respondent's alleged acceptance did not comply with the specific amount required by Appellant's offer of compromise. This constituted a counteroffer and not a contractual acceptance. The only logical conclusion to draw from these facts is that Respondent's tender of only the bodily injury policy limits and not the property damage limits constituted a counteroffer as it never met the essential and material terms of Appellant's offer to compromise.

CONCLUSION

For the foregoing reasons, Appellant respectfully argues that the Trial Court's Order granting Respondent's Motion for Summary Judgment was in error, should be reversed, and that the case be remanded to the Circuit Court for a trial on the merits.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Initial Brief of Respondent complies with Rule 211(b), SCACR.

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