Case No. 83239

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDITH SALTER, INDIVIDUALLY; JOSHUA KANER, INDIVIDUALLY; AND JOSHUA KANER AS GUARDIAN AND NATURAL PARENT OF SYDNEY KANER, A MINOR, Appellants, vs. EDWARD RODRIGUEZ MOYA, AN INDIVIDUAL; AND BERENICE DOMENZAIN-RODRIGUEZ, AN INDIVIDUAL, Respondents.	Appeal from the Eighth Judicial District Court, Clark County The Honorable Jaqueline Bluth District Court Case No.: A-20-827003-C

APPELLANTS' OPENING BRIEF

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NRCP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Appellants, Judith Salter and Joshua Kaner, individually and as guardian and natural parent of Sydney Kaner, a minor, are individuals and were and are represented by Daniel Price, Esq. and Christopher Beckstrom, Esq. of the law firm Price Beckstrom, PLLC.

2. Respondents, Edward Rodriguez Moya and Berenice Domenzain-Rodriguez, are individuals and were represented below by Darrel Dennis, Esq. and Michael Smith, Esq. of the law firm of Lewis Brisbois Bisgaard & Smith LLP.

Dated this 2nd day of November, 2021.

Price Beckstrom, PLLC

/s/ Daniel Price

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JURISDICTIONAL STATEMENT

Appellants appeal from an order entered on July 10, 2021. Appendix, Vol. 3, 542–7. That order granted reconsideration of Respondent's motion to enforce a purported settlement agreement and disposed of the entire action, which constitutes a final judgement under NRAP 3A(b)(1). Timely notice of appeal was properly filed on July 14, 2021. NRCP 4(a)(1).

This Court has jurisdiction pursuant to Article 6, Section 4 of the Nevada Constitution and NRS 2.090(1).

ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals as an appeal of a judgment in a tort action enforcing a purported settlement agreement of $50,000. NRAP 17(b)(5).

ISSUE PRESENTED FOR APPEAL

Whether the District Court erred when it construed a counteroffer letter as acceptance of a settlement offer that explicitly required acceptance by performance, even though there has never been performance.

STATEMENT OF THE CASE

This action arises from a rear-end motor vehicle collision caused by Edward Rodriguez Moya ("Moya") that injured Judith Salter, Joshua Kaner, and Sydney Kaner (the "injured parties"). After suit Moya filed a "motion to enforce settlement agreement," which the district court denied due to lack of acceptance. The injured parties' settlement offer required acceptance by performance, and the district court found that a letter from the Moya's insurance carrier did not constitute acceptance. Moya moved for reconsideration, which was granted by the district court. This appeal followed.

STATEMENT OF FACTS

On July 25, 2020, Edward Rodriguez Moya ("Moya") was driving southbound on Rancho Drive in Las Vegas toward Bonanza Road when he rear-ended a motor vehicle that was stopped at that intersection. Judith Salter, Joshua Kaner, and Sydney Kaner (the "injured parties") were in the vehicle that Moya rear-ended and were injured. Judith is Joshua's mother and Sydney's grandmother.

Moya and the vehicle owner, Berenice Domenzain-Rodriguez,[1] were insured through GEICO Advantage Insurance Company ("Geico"). Shortly after an insurance claim had been opened, Geico sent a letter stating: "Please note that we are respectfully denying your client[s'] injury claim[s] as having no causal relationship to this loss. We will not be collecting any medical records for this file." Appendix, Vol. 1, 137.

On October 22, 2020, the injured parties extended a written settlement offer to Moya/Geico. *Id.*, Vol. 1, 124–25. That settlement offer expressly limited the method of acceptance to acceptance by performance only:

> This offer expires on November 23, 2020 at 1:00 p.m., Pacific Time. **This offer can only be accepted by the following performance**, accomplished prior to the expiration of this offer:
>
> 1) Receipt of $50,000 (the global policy limits of this policy) in my office, payable to "Price Beckstrom, PLLC, Judith Salter, Joshua Kaner, and Sydney Kaner."

Id., Vol. 1, 124–25 (emphasis modified). This settlement offer also stated that "all funds attributable to minor Sydney Kaner will be held

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[1] Moya and Berenice Domenzain-Rodriguez are sometimes collectively referred to herein as ("Moya").

in trust until an order is issued from the appropriate court compromising the minor's claim, and at such time the funds will be distributed as ordered by the court." *Id.*

On November 12, 2020, Geico sent a counteroffer that stated:

> At this time, **we are extending an offer** of the global limit of $50,000 to settle the three (3) bodily injury claims presented in this loss.
>
> **Please take this matter under consideration** to come up with a distribution of our remaining policy limits (with no one person receiving more than $25,000 single policy limit and all parties limited to $50,000 combined.) Please notify me when you have come to a conclusion regarding the disbursement of the remaining limits.
>
> **Please note that all parties must agree to settlement before we can issue payments. We will coordinate with all parties to assist in the agreement and anticipated resolution to include the utilization of a mediator if necessary.**

Id., Vol. 1, 127–29 (emphasis added). On December 1, 2020, the injured parties declined Geico's counteroffer. *Id.*, Vol. 1, 131. Suit was filed and Moya brought a motion "to enforce settlement agreement" arguing that Geico's November 12, 2020, letter was valid acceptance. *Id.*, Vol. 1, 1–112.

The district court found that the injured parties "served an unambiguous pre-litigation settlement offer to GEICO on October 22, 2020, requiring acceptance by performance" and that it was "undisputed that [Geico] did not provide payment in the manner specified prior to the deadline." *Id.*, Vol. 2, 258–60. The district court ultimately found that "the essential element of acceptance is not present to form an enforceable contract . . ." *Id.* at 260

Moya then filed a motion for reconsideration arguing that the district court's order was clearly erroneous. *Id.*, Vol. 2, 269–392. The injured parties opposed the motion for reconsideration. *Id.*, Vol. 2, 393–412. The district court granted the motion for reconsideration finding the first order to be clearly erroneous. *Id.*, Vol. 3, 542-45. The district court found that it would not have been impossible for Geico to issue a single check as required by the settlement offer. *Id.* at 543. The district court concluded that Geico's November 12, 2020, letter "was a valid Acceptance of [the injured parties'] Offer insofar as the [letter] expressed an acceptance of [the] material terms as articulated in the [injured parties'] Settlement Offer . . . ." *Id.* at 543.

SUMMARY OF ARGUMENT

Settlement agreements are contracts and governed by principles of contract law. The most basic principle of contract law is that offer, acceptance, mutual assent, and consideration must all be present to form a contract. The offeror is master of the offer and can specify acceptable methods of acceptance, such as limiting acceptance to performance. Because the injured parties' settlement offer restricted acceptance to performance, and because Moya did not perform—and still has not performed—there has never been acceptance. Geico's counteroffer letter was not acceptance as it proposed a new term and did not mirror the offer. There has never been a settlement agreement to enforce.[2]

[2] Moya raised other arguments below that are not germane to this appeal including impossibility, illegality, materiality, and issues related to compromises of minor's claims.

ARGUMENT

I.

There Has Never Been a Settlement Agreement Because There Has Never Been Valid Acceptance

A. Standard of Review

"Contract interpretation is subject to a de novo standard of review." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). "However," "whether a contract exists is [a question] of fact" and this Court "defer[s] to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *Id.*

B. The Settlement Offer Appropriately Limited Acceptance to Performance and Moya's Failure to Perform is Fatal to Formation of a Contract

"Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

An offeror, as the master of the offer, may specify the manner of acceptance, and the offeree must perform accordingly to form a legally enforceable contract. Restatement (Second) of Contracts § 30(1); *see also Eagle Materials, Inc. v. Stiren*, No. 53438, 2011 Nev. Unpub. LEXIS 1086, at *4 (Feb. 3, 2011) ("An offer for a unilateral contract invites

acceptance by the performance of an act.").

"Where the offer requires acceptance by performance and does not invite a return promise . . . a contract can be created only by the offeree's performance." Restatement (Second) of Contracts § 50 cmt. b (emphasis added). A mere promise to perform, without actual performance, does not constitute valid acceptance when the offer requires acceptance by performance. *Id.*

This concept is not novel. *E.g.*, *Kitchens v. Ezell*, 315 Ga. App. 444, 447, 726 S.E.2d 461, 465 (2012) ("[A]n offer to settle 'must be accepted in the manner specified by it; and if it calls for a promise, then a promise must be made; or if it calls for an act, it can be accepted only by the doing of the act.'"); *Smith v. Malone*, 83 Ark. App. 99, 105, 117 S.W.3d 643, 647 (2003) ("This offer invited acceptance by performance, not by a reciprocal promise."); *Southampton Dev. Corp. v. Palmer Realty Grp., Inc.*, 769 So. 2d 1113, 1115 (Fla. Dist. Ct. App. 2000) ("The agreement between Palmer and Southampton was not a contract. Rather, it was an offer by Southampton to enter into a unilateral contract, an offer that called for Palmer's acceptance by performance."); *Davis v. Jacoby*, 1 Cal. 2d 370, 378, 34 P.2d 1026, 1029 (1934) ("The distinction between unilateral and bilateral contracts is well settled in

the law.").

In the present matter, the injured parties, as the offerors, had the right and power to specify the method of acceptance that would bind them. They used this power to expressly limit the method of acceptance to performance only:

> This offer expires on November 23, 2020 at 1:00 p.m., Pacific Time. **This offer can only be accepted by the following performance**, accomplished prior to the expiration of this offer:
>
> 1) Receipt of $50,000 (the global policy limits of this policy) in my office, payable to "Price Beckstrom, PLLC, Judith Salter, Joshua Kaner, and Sydney Kaner."

Appendix, Vol. 1, 124–25 (emphasis modified). The language in this offer could not be clearer. Only through performance—by delivering a check before the expiration of the offer—could Moya/Geico accept this offer. Moya/Geico did not perform and to date has not performed. A contract never formed and the district court erred when it granted Moya's motion to enforce a settlement agreement.

C. Geico's Counteroffer Letter Was Not Valid Acceptance and No Settlement Agreement Was Formed

The common law mirror image rule applies to the injured parties' offer and Geico's letter in this case. *See Branch Banking & Tr. Co. v.*

Windhaven & Tollway, Ltd. Liab. Co., 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015) ("We presume that a statute does not modify common law unless such intent is explicitly stated."); *compare* NRS 104.2207 (abrogating the common law mirror image rule only in the context of sales of goods).

"The mirror-image rule states that a purported acceptance of an offer which attempted to modify one or more terms of the offer **acted as a rejection of the offer and resulted in a counteroffer**." *Shikwan Sung v. Hamilton*, 676 F. Supp. 2d 990, 999 (D. Haw. 2009) (emphasis added). "It is elementary law that an offer must be unconditionally accepted by the offeree to become a binding contract." *Id.* Indeed, "acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested." *See*, *e.g.*, *Parry v. Walker*, 657 P.2d 1000, 1002 (Colo. App. 1982) (citing 1 Restat of Contracts, § 59) (internal quotation marks omitted).

The injured parties' offer had one term: deliver a check of $50,000 prior to the expiration of the offer made out to the injured parties and their counsel. Appendix, Vol. 1, 124–25. It is undisputed that instead of delivering a check Geico sent a letter dated November 12, 2020, stating:

> At this time, **we are extending an offer** of the global limit of $50,000 to settle the three (3) bodily injury claims presented in this loss.
>
> **Please take this matter under consideration** to come up with a distribution of our remaining policy limits (with no one person receiving more than $25,000 single policy limit and all parties limited to $50,000 combined.) Please notify me when you have come to a conclusion regarding the disbursement of the remaining limits.
>
> **Please note that all parties must agree to settlement before we can issue payments. We will coordinate with all parties to assist in the agreement and anticipated resolution to include the utilization of a mediator if necessary.**

Id., Vol. 1, 127–29 (emphasis added). Geico's letter included a new term that would require the injured parties to specify amounts for each individual payee. Operation of the mirror image rule lays bare that this is a rejection and counteroffer, not an acceptance, because the terms of this letter are not the mirror image of the injured parties' offer.

Geico's own letter acknowledges that this is not acceptance of the injured parties' offer when it states "we are extending an offer" and asks the injured parties to "[p]lease take this matter under consideration" and to "notify [Geico] when you have come to a conclusion regarding the disbursement of the remaining limits." Furthermore, Geico's letter

confirms there was no agreement at that time when it states "all parties must agree to a settlement before [Geico] can issue payments." Geico even offered to "coordinate with all parties to assist in the agreement and anticipated resolution to include the utilization of a mediator if necessary."

If this letter was an acceptance of the injured parties' settlement offer, there would be no use for a mediator and no reason to offer to "assist in the agreement and anticipated resolution." There would be no "anticipated resolution" if this letter were acceptance of the offer because there would be an actual resolution.

Florida appellate courts have decided at least two cases that are on point. In the first, *Knowling v. Manavoglu*, the issue before that court was "whether the trial court erred in concluding that a binding settlement agreement had been reached before the lawsuit was filed." 73 So. 3d 301, 302 (Fla. Dist. Ct. App. 2011). *Knowling* was a personal injury action arising from a motor vehicle collision. Before litigation, the claimant extended a written settlement offer "stat[ing] that 'actual performance [was] required for acceptance' and included three requirements: (1) 'a check for all available policy limits'; (2) 'all items described in Florida Statutes 627.4137'; and (3) 'a general BI release of

your insureds, ready for . . . signature." *Id.* The Florida District Court of Appeal summed up the relevant holding as follows:

> The offer was expressly conditioned upon acceptance by performance, which included the provision of a 'ready for signature' release to settle the claim for bodily injury only. The tendered release purported to encompass **all** claims arising from the accident, and included indemnification language, a new term, not contained within the offer. As such, the so-called acceptance was nothing more than a counter-offer, and Appellant was not bound by it in the absence of a manifestation of assent to the additional terms."

Id. at 303 (emphasis in original, internal citations omitted).

The second case, *Thompson v. Estate of Maurice*, was a wrongful death action arising from a motor vehicle collision. 150 So. 3d 1183, 1189 (Fla. Dist. Ct. App. 2014). The issue before that court was "whether the evidence demonstrated that the parties reached a binding settlement agreement before [the claimant] filed suit." *Id.* at 1185. The claimant "sent a demand letter through his counsel to GEICO Insurance Company . . . enumerating four conditions for acceptance." *Id.* Those four conditions were:

> 1) Receipt of an affidavit of no additional insurance coverage executed and notarized by a representative of GEICO Insurance Company.
>
> 2) Receipt by our office a [sic] certified policy # 4186492783.
>
> 3) Tender of a property damage check in the amount of $1,830.00 made payable to the Estate of Scott Thompson. . . .
>
> . . . .
>
> 4) Tender of a settlement draft in the full amount of the bodily injury policy limits available for your insured, made payable to the Estate of Scott Thompson and Ellis, Ged & Bodden, P.A. Please be advised that this settlement offer will remain open until 5:00 p.m. on March 9, 2011. . . .

Id. Geico responded with a "letter [that] mirrored the four settlement conditions" but also included a release and a statement that Geico "would appreciate receipt of the executed release, along with a copy of the Letters of Administration of the Estate, *prior* to disbursement of the proceeds of this settlement." *Id.* at 1185–86 (emphasis in opinion but not in original letter). That court held that "GEICO did not assent to the same matters contained in the offer . . . [a]s such, GEICO's responsive letter was not a valid acceptance, but rather a counteroffer." *Id.* at 1188.

Just like the result in these two Florida cases, the letter that Geico sent here was a rejection and counteroffer as it did not mirror the offer. Geico's letter was a counteroffer to pay the $50,000 policy limits and invited acceptance by performance—providing specific sums for each claimant. The district court erred when it concluded that Geico's letter, which did not mirror the offer and was a counteroffer, constituted valid acceptance of the injured parties' settlement offer.

CONCLUSION

The injured parties extended a settlement offer that expressly limited the method of acceptance to performance: delivery of a check for the policy limits. Because Moya/Geico did not, and has not, performed, there is no settlement offer to enforce. The letter that Geico sent in response to the settlement offer did not mirror the settlement offer and was therefore a rejection and counteroffer. No settlement agreement has formed and it was error for the district court to conclude otherwise and dismiss the action. The injured parties request that the district court's order be vacated and the litigation be reinstated.

CERTIFICATION OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and typestyle requirements of NRAP 32(a)(4)–(6) as it was prepared with proportionally spaced typeface in 14-point, double spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because it contains 2,821 words, not including the disclosure statement, table of contents, table of authorities, or certificates of compliance and service.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not I may be subject to sanctions.

Dated this 2nd day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***Appellants' Opening Brief*** was filed with the Supreme Court of Nevada on the date indicated below and electronic service of the same shall be made in accordance with the Master Service List as follows:

Darrell Dennis, Esq.
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DATED this 2nd day of November, 2021.

/s/ Daniel Price
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