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' REPLY 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 3rd day of January, 2022.

Price Beckstrom, PLLC

/s/ Daniel Price

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ARGUMENT

I.

There Has Never Been a Settlement Agreement Because There Was Never 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 Injured Parties, as offeror, exercised their power to limit acceptance to performance and never "requested return promises."

In the answering brief, Moya asserts that "Salter and Kaner's offer was a bilateral contract in that it requested return promises." Resp't's Br. 23. This assertion is plainly incorrect. As the master of the offer, the offeror "may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance." Restatement (Second) of Contracts, § 30. "[T]he offeror is entitled to insist on a particular mode

of manifestation of assent." *Id.*, cmt a.

The settlement offer unambiguously required performance as the *only* mode for acceptance:

> 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 of the offer was clear and explicit. If Moya/Geico wished to accept the offer they were required to perform. A promise to perform could not create a binding contract, only performance could create a binding contract.

C. Even if the November 12 letter attempted to manifest assent to the terms of the offer it did not do so in the manner required by the offer.

Moya argues that Geico's November 12 letter "demonstrated an overt manifestation of assent to the material terms of the contract . . . establishing the existence of a valid and enforceable contract." Resp't's Br. 13–14. Even if the November 12 letter manifested assent to the terms of the offer, the offer limited acceptance to performance so the only manifestation that could constitute acceptance was performance.

"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). "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement (Second) of Contracts § 50(1) (emphasis added).

A mere promise to perform, without actual performance, does not constitute valid acceptance when the offer requires acceptance by performance. *Id.* Accordingly, only performance by delivery of the check could constitute acceptance. Moya/Geico has never performed. No contract was formed and the District Court's order to the contrary was clear error and not based on any evidence.

II.

NRS 41.200 and 485.185 Did Not Impede Offerees' Ability to Accept by Performance.

A. The offer specified that the Injured Parties would comply with NRS 41.200.

NRS 41.200 requires that a petition be brought to the District Court to compromise a minor's disputed claim for money against third parties. Moya asserts that "Salter and Kaner did not provide any

information or guidance on this topic . . . ." Resp't's Br. 17. This is simply incorrect as the offer itself was completely clear on compliance with this statute. The offer specified that if it were accepted appropriate procedures would be followed to comply with NRS 41.200:

> Additionally, all funds attributable to minor Sydney Kaner will be held 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.

Appendix, Vol. 1, 124–25. It is completely common for a tortfeasor's insurance carrier and the attorney for an injured minor to enter into a settlement agreement and then seek the court's approval. There is nothing more that can be done before an agreement is reached than assure compliance with the minor's compromise statute. NRS 41.200 posed no impediment to acceptance of the offer.

B. NRS 485.185 did not impede acceptance by performance.

NRS 485.185 requires vehicle owners to carry a minimum level of liability insurance coverage. During the hearing on the motion to reconsider, Respondents' counsel conceded that it could have performed and delivered a single check. "I mean, I agree that the -- what Plaintiff's counsel's asking for in their initial ask [the offer] is something that carriers do all the time." Appendix, Vol. 3, 561 at lines 16–18. Later in

the hearing, the District Court further inquired about a single check being issued:

> THE COURT: Can I ask you just -- Mr. Smith, I can I ask you just a practical question? Because on this side of the courtroom, you know, I don't generally see how these are done.
>
> When a minor is involved, do -- and you have a family involved, do the checks normally come separate? Do the checks over to Plaintiff normally come in separate amounts or do they normally go over to the Plaintiff and then Plaintiff cuts it? How does that work?
>
> MR. SMITH: Well, that's interesting, because it happens very -- a lot of different ways.

Appendix, Vol. 3, 572:20–573:4. With these concessions, the District Court's order specifically found that "it would not have been impossible for Defendants to tender a single settlement draft to plaintiffs in response to the Plaintiffs' Settlement offer . . . ." *Id.*, 543:7–11. NRS 485.185 did not impede acceptance by performance.

III.

Because the Offer was Never Accepted a Contract Never Formed and Other Arguments are Immaterial to this Appeal.

Moya's answering brief asserts that when the Injured Parties did not respond to the November 12 letter they breached an implied covenant of good faith and fair dealing. Because there was no

acceptance and no contract, there can be no implied covenant of good faith and fair dealing. This argument, along with others raised below and not raised on appeal, are immaterial to the disposition of this appeal.

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 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 1,168 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 3rd day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***Appellants' Reply 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.
Michael Smith, Esq.
Attorneys for Defendant Edward Rodriguez Moya

DATED this 3rd day of January, 2022.

/s/ Daniel Price
Price Beckstrom, PLLC