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May 1, 2015

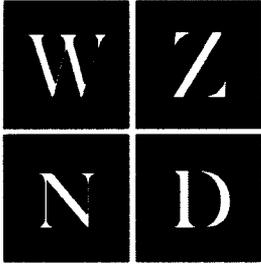
To: Melissa C. Patton, Wsq., Webb, Zschunke Neary & Dikeman, LLP, One Securities
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Case Number: _____ Lower Court: _____ County Superior Court _____

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- There is no case pending in the Court of Appeals of Georgia under your name.**
- A Notice of Appeal is filed with the clerk of the trial court and not with the Court of Appeals of Georgia. See OCGA §5-6-37.** Once the trial court clerk has received and filed the Notice of Appeal, the trial court clerk will prepare a copy of the record and transcripts as designated by the Notice of Appeal and transmit them to this Court. Once the Notice of Appeal is docketed in the Court of Appeals of Georgia, a Docketing Notice with the Briefing Schedule and other important information is mailed to counsel for the parties or directly to the parties, if the parties are representing themselves. You do not need to provide this Court with a copy of the Notice of Appeal you filed with the superior court.
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- A request for an out-of-time appeal should be made to the trial court from which you are appealing.** If your motion is denied by the trial court, you can file an appeal of that decision by filing a Notice of Appeal with the clerk of the superior court.
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April 30, 2015

VIA FEDERAL EXPRESS

Clerk of Court
Court of Appeals of Georgia
47 Trinity Avenue, SW
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RE: Linda Willis v. Allstate Insurance Company
Court of Appeals of Georgia
Appeal Case No.: A15A-1252
Our File No.: 1-2192

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Dear Sir/Madam:

Enclosed for filing are the original and three (3) extra copies of the Brief of Appellee. Please acknowledge receipt of this Brief by returning a stamped "filed" copy of same to me in the enclosed self-addressed, stamped envelope. Thank you for your assistance in this matter.

Very truly yours,

MELISSA C. PATTON

MCP/lrm
Enclosures
cc: W. Bryant Green, III, Esq. (w/encl.)

Franklin Builder, Inc., 305 Ga. App. 863, 700 S.E.2d 609 (2010). The burden is upon the party alleging error to show it affirmatively in the record. *Cronin v. Homesales, Inc.*, 296 Ga. App. 293, 294, 674 S.E.2d 35 (2009). Appellant's Statement of Facts also includes numerous allegations, which are in no way relevant to the limited issue on appeal, i.e. whether Allstate waived the two year suit limitation. Allstate hereby responds to the relevant allegations.

A. Allstate's Responses to Appellant's Statement of Facts

Allstate disputes the following allegations contained within Appellant's Statement of Facts:

1. "Willis I arose out of Judge Russell's March 9, 2012 entry of an Order on Allstate Insurance Company's Motion for Partial Summary Judgment." (Brief of Appellant, p. 2; no record citation given). In addition to the Order on Allstate's Motion for Summary Judgment, when this case previously appeared before this Honorable Court, this Court reviewed the trial court's Order precluding Allstate from entering evidence at trial regarding liability, precluding Allstate from offering any defense at trial, including policy defense, denying Allstate's request to have only the well-pled factual allegations of Willis' complaint read to the jury;

and denying Allstate's motion to exclude the opinion testimony of Willis' expert. Willis v. Allstate Ins. Co., 321 Ga. App. 496, 496-497, 740 S.E.2d 413 (2013).

2. "The adjuster took complete custody, control, and possession of the property by taking Ms. Willis' keys and thereafter placing a lock box on her door." (Brief of Appellant, p. 3; no record citation given). Conclusions of law, facts not well pleaded and forced inferences are not admitted by a default judgment. Willis, 321 Ga. App. at 497. Appellant's allegations regarding custody and control are legal conclusions, which Allstate disputes. Moreover, legal conclusions present no issue of fact on a motion for summary judgment. Couch v. Bent Tree Community, Inc., 310 Ga. App. 319, 322, 713 S.E.2d 402 (2010).

3. "Ms. Willis' complaint also alleged that Defendant Allstate continued to make statements to lead her to believe the claim was being processed, knowing that each of its statements were false and misleading, 2) intended solely to lull her into the false sense of security of believing that liability was clearly accepted, and that 3) Allstate was then solely considering the issue of damages." (Brief of Appellant, p. 4; no record citation given). Conclusions of law and forced inferences are not admitted by a default judgment. Willis, 321 Ga. App. at 497. Allstate disputes Appellant's opinions regarding Allstate's knowledge and intent.

Moreover, legal conclusions present no issue of fact on a motion for summary judgment. *Couch*, 310 Ga. App. at 322.

4. “Despite Allstate’s representations (together with its misrepresentations) to Ms. Willis, its agents acted in a manner so as to delay her past the ... time within which the policy required her to file her action in the Courts.” (Brief of Appellant, p. 4; no record citation given). This allegation does not contain sufficient detail regarding the alleged action(s) to constitute a statement of fact. *Zampatti v. Tradebank Intl. Franchising Corp.*, 235 Ga. App. 333, 336, 508 S.E.2d 750 (1998).

5. “Ms. Willis’ Complaint pled that Allstate’s representations were false, and were done solely with the intent of ultimately denying her claim so as to provide a basis for their presently arguing the ... suit limitation. Allstate’s deceptive practice of delay was set forth as an exception to the Statute of Limitations. Allstate’s denial of the claim was in bad faith, fraudulent, and a blatant breach of policy of insurance.” (Brief of Appellant, p. 4; no record citation given). Appellant has not identified any adjuster or provided any information regarding the substance of any alleged statements by Allstate. This allegation does not contain sufficient detail regarding the alleged action(s) to constitute a statement

of fact. Zampatti, 235 Ga. App. at 336. Allstate disputes these legal conclusions and forced inferences. Couch, 310 Ga. App. at 322.

6. The trial court's Order Denying Defendant's Motion To Open Default "provided Allstate with clear guidance pay the full value of Ms. Willis' then sixty-one (61) month loss." (Brief of Appellant, p. 6; no record citation given). The trial court's Order, which is not contained in the record on appeal, contained no such language or implication.

7. "Clearly, Defendant Allstate's actions were merely a manner of delaying the claim with a false sense of security that as a policy holder, negotiations were on-going delaying settlement of said claim until the expiration of the statute of limitations." (Brief of Appellant, pp. 14-15, quoting the Affidavit of Willis). Conclusory allegations by way of an affidavit, unsupported by specific allegations of fact, are not sufficient to avoid summary judgment. Gwinnett Community Bank v. Arlington Capital, LLC, 326 Ga. App. 710, 716, 757 S.E.2d 239 (2014). In order to constitute a statement of fact for purposes of summary judgment, an affidavit must provide "specificity as to times, places, party or parties, transactions, occasions, or events." Zampatti, 235 Ga. App. at 336.

8. "Plaintiff's continuing discussions with Defendant Allstate's agents, adjusters, representatives, and 'preferred' contractors was intended to deceive the Plaintiff to subvert her attention away from strict compliance of the policy terms. It is clear that Defendant's intentions were to lure her into a false sense of security." (Brief of Appellant, pp. 14-15, quoting the Affidavit of Willis). Such bare conclusions must be disregarded. See *Gwinnett Community Bank*, 326 Ga. App. at 716.

9. During oral argument on Allstate's Motion for Summary Judgment, counsel for Ms. Willis represented to the trial court that the claim was not denied before the suit limit expired. (Brief of Appellant, p. 15). This is incorrect. On November 29, 2007 and December 4, 2007, Allstate advised Ms. Willis as follows:

Please be advised that Allstate will not further consider the above referenced claims. As you know, during the course of its investigation into the above referenced claims, Allstate on numerous occasions requested that you provide or produce further information substantiating your claims. That information was not provided in violation of the terms of the subject policy of insurance which

obligated you to cooperate with Allstate and provide reasonably available information. In addition, during the course of its investigation, Allstate learned that you had misrepresented material facts related to the claim and your claimed loss and damage in violation of the policy of insurance and the laws of the State of GA.

(R-124, 132-133)(emphasis added).

10. In a footnote of her Brief, Appellant contends that all of Allstate's letters were sent to an address that Allstate knew Plaintiff no longer resided. (Brief of Appellant, p. 19, fn. 2). This is incorrect. Three of the letters in the record were mailed to a post office box provided by Ms. Willis. (R-114-116, 120-124). Two of which were sent certified and signed for by Ms. Willis. (R-114-116, 120-123). Three of the letters in the record were sent to Ms. Willis' counsel. (R-128-131, 135-136). And Allstate communicated with Ms. Willis through email. (R-112-113).

B. Allstate's Additional Statement of Facts

In her recitation of the procedural history of this case, Appellant omitted the fact that this Honorable Court reversed the trial court's Order preventing Allstate from contesting liability or offering any defense to liability at trial, including

policy defenses.¹ Willis, 321 Ga. App. at 501-502. Additionally, the Appellant omitted the policy provision at issue in this appeal. It is undisputed the Allstate Policy issued to Linda Willis provides:

Suit Against Us

No suit or action may be brought against us unless there has been full compliance with all policy terms. Any suit or action must be brought within one year after inception of loss or damage. (T-3).²

In her Brief, the Appellant references Allstate's many reservation of rights letters. More specifically, throughout the claims process, Allstate repeatedly advised Plaintiff that it was reserving all rights under the Policy as follows:

On May 2, 2006, Allstate wrote: Please understand that no action of Allstate or its representatives should be considered by you to be a waiver of any of the terms, conditions, or provision contained in the

^{1/} The contractual suit limitation is a policy defense as opposed to a statute of limitation. See Wright Assoc. v. Rieder, 247 Ga. 496, 501, 277 S.E.2d 41 (1981).

^{2/} At the time Plaintiff's suit was filed, the one-year suit limitation had been extended to a two-year suit limitation. See White v. State Farm Fire and Casualty Co., 291 Ga. 306, 728 S.E.2d 685 (2012).

Allstate policy of insurance or found under the laws of the State of Georgia. On the contrary, **Allstate will continue to insist upon strict compliance with the terms, conditions and provisions contained in the Allstate policy of insurance and found under the laws of the State of Georgia. Should the circumstances arise please be aware that Allstate will avail itself of all defenses available under the terms and conditions of the policy as well applicable law.** (R-110-111)(emphasis in original).

On May 24, 2006: In an email requesting information, Allstate wrote: Our insured will need to comply with all policy conditions & terms. (R-112-113).

On June 29, 2006: In a letter outlining the insured's failures to comply with Policy conditions, Allstate wrote: Please understand that no action of Allstate or its representatives should be considered by you to be a waiver of any of the terms, conditions, or provision contained in the Allstate policy of insurance or found under the laws

of the State of Georgia. On the contrary, Allstate will continue to insist upon strict compliance with the terms, conditions and provisions contained in the Allstate policy of insurance and found under the laws of the State of Georgia. Should the circumstances arise please be aware that Allstate will avail itself of all defenses available under the terms and conditions of the policy as well applicable law. (R-114-116).

On September 21, 2006 Allstate wrote: Allstate does not waive any of the terms or conditions found in the policy of insurance or under Georgia law. On the contrary, Allstate will continue to insist upon strict compliance with both the terms and conditions of the Allstate policy of insurance and the laws of the State of Georgia. (R-117-119).

On September 28, 2006: In a letter outlining the insured's failures to comply with Policy conditions, Allstate wrote: Please understand that no action or inaction by Allstate should be interpreted by you to be a waiver of any terms, conditions, or provisions found either in the

policy of insurance or the laws of the State of Georgia. On the contrary, Allstate will continue to insist upon strict compliance with both the terms and conditions of the Allstate policy of insurance and laws of the State of Georgia. (R-120-123).

On October 10, 2006: Allstate's counsel wrote to Plaintiff's counsel confirming the Examination Under Oath of Ms. Willis and stated: Please understand that no action of Allstate Insurance Company or its representatives should be considered as a waiver of any of the terms, conditions, or provision contained in the Allstate policy of insurance or found under the laws of the State of Georgia. On the contrary, Allstate will continue to insist upon strict compliance with the terms, conditions, and provisions contained in the Allstate policy of insurance and the laws of the State of Georgia. (R-128-129).

On November 22, 2006: Allstate's counsel forwarded to Plaintiff's counsel the EUO transcript and stated: Please understand that no action by Allstate should be considered by you or your client to

suggest that Allstate will or might waive any term or condition found in the policy of insurance or under the laws of the State of Georgia. On the contrary, Allstate will continue to insist upon strict compliance with the terms and conditions found in the policy of insurance as well as under the laws of the State of Georgia. (R-130-131).

On November 29, 2007, Allstate wrote: Please be advised that Allstate will not further consider the above referenced claims.... Allstate is sending this letter at the request of the Office of the Insurance and Fire Safety Commissioner and it should not be interpreted by you as a waiver of any of the term, condition or provision found in the policy of insurance or under the laws of the State of Georgia. On the contrary, Allstate will continue to insist upon strict compliance with the policy of insurance and the laws of the State of GA. (R-124).

On December 4, 2007, Allstate's counsel wrote: Please be advised that Allstate will not further consider the above referenced claims....

Allstate is sending this letter at the request of the Office of the Insurance and Fire Safety Commissioner and it should not be interpreted by you as a waiver of any of the term, condition or provision found in the policy of insurance or under the laws of the State of Georgia. On the contrary, Allstate will continue to insist upon strict compliance with the policy of insurance and the laws of the State of Georgia. (R-132-133).

On September 5, 2008, Allstate's counsel wrote to Plaintiff's counsel:

In your letter of August 19, 2008, you very strongly assert that you will be filing suit on behalf of Ms. Willis very soon. However, before doing so, it is very important that you take a moment to examine the policy of insurance, the terms of which would govern any legal action brought by your client. That policy contained a suit limitation period which obligated Ms. Willis to file suit, if at all, within one year of the date of the loss. Georgia law has subsequently extended the suit limitation period to two years in all homeowner's policies of insurance issued in the State of Georgia. However, that modification

does not alter the conclusion that the time to bring suit on any claim specified in your letter has expired.

Because the time period for filing suit has expired, please understand that Allstate will consider the filing of any action as outlined in your letter to be frivolous and will take all steps necessary to recover all available costs and penalties. Should you wish to discuss any of these matters further, please do not hesitate to contact me. In the meantime, this letter should not be interpreted by you to be a waiver of any term, condition, or provision found in the policy of insurance or under the laws of the State of Georgia. On the contrary, Allstate will continue to insist upon strict compliance with the policy of insurance and the laws of the State of Georgia. (R-135-136).

On December 16, 2008, well over two years after the three reported losses occurred, Plaintiff filed suit against Allstate seeking recovery under the policy. (T-

2).³ The suit was removed to the United States District Court for the Northern District of Georgia, Atlanta Division.⁴ However, Plaintiff dismissed the first suit because that action was not timely filed pursuant to the terms of the Allstate policy of insurance. On January 25, 2010, Plaintiff renewed her previous action filed against Allstate. (R-3-15).

PART TWO

ARGUMENT AND CITATION OF AUTHORITIES

The Allstate Policy issued to Ms. Willis contains a standard one-year suit limitation. (T-3).⁵ Such suit limitations in insurance policies are enforceable in Georgia. *Encompass Ins. Co. of America v. Friedman*, 299 Ga. App. 429, 432, 682 S.E.2d 694 (2009). An insured's compliance with such a provision is a condition precedent to filing a lawsuit based upon the Policy. *Smith v. Allstate Ins. Co.*, 159 Ga. App. 743, 285 S.E.2d 82 (1981).

^{3/} *Linda Willis v. Allstate Insurance Co.*, Civil Action No. 2008-CV-161594.

^{4/} *Linda Willis v. Allstate Insurance Co.*, Case No. 1:09-CV-0103.

^{5/} At the time Plaintiff's suit was filed, the one-year suit limitation had been extended to a two-year suit limitation. See *White*, 291 Ga. 306.

Here, the three losses at Ms. Willis' house allegedly occurred on February 27, 2006, February 28, 2006 and September 3, 2006. (T-2). However, she did not file suit against Allstate until December 16, 2008. (T-2). This was well over two years after the dates of loss. Since Ms. Willis failed to comply with the applicable suit limitation, the trial court properly granted summary judgment in favor of Allstate as a matter of law. Although stated in two slightly different ways in her Enumerations of Error, the only argument made by Ms. Willis in this appeal is that she was not required to file suit within two years of the loss because Allstate waived the suit limitation in the Policy. This argument fails as a matter of law.

1. **The Trial Court Properly Relied on *Allstate v. Sutton*, Rather Than *Auto-Owners v. Ogden* on the Issue of Waiver.**

The Appellant's first enumeration of error calls into question the trial court's reliance on one case over another case on the issue of waiver. Each case is addressed here separately.

A. **The Trial Court Properly Relied on the Sutton Line of Cases.**

In *Allstate Insurance Company v. Sutton*, 290 Ga. App. 154, 658 S.E.2d 909 (2008), an insured filed suit against Allstate seeking coverage under a homeowner's policy for mold damage allegedly caused by a plumbing leak.

Although the loss occurred on February 6, 2002, suit was not filed until September 23, 2003. *Id.* at 155. Allstate filed a motion for summary judgment based on the insured's failure to file suit within one year of the date of loss, as required by the policy. *Id.* The trial court denied the motion, finding there was a question of fact concerning whether Allstate waived the suit limitation. *Id.* at 156.

On appeal, this Honorable Court reviewed the record in Sutton and determined there was no such fact question, explaining that settlement negotiations do not always give rise to a jury question on whether the policyholder was led to believe that he need not file suit, even if the negotiations continue throughout the policy's limitation period. 290 Ga. App. at 156.

[M]ere negotiation for settlement, unsuccessfully accomplished, is not that type of conduct designed to lull the claimant into a false sense of security so as to constitute a waiver of the limitation defense. And where inconclusive settlement negotiations *were explicitly conditioned on the policy terms, the policyholder cannot create a jury issue by claiming a belief that the insurer would waive the contractual limitation provision.*

Id. at 157 (citations omitted)(emphasis added). In Sutton, Allstate explicitly stated in its correspondence with the insured that it reserved all rights and defenses under the policy. Since there was no showing in the record of any affirmative statement or act by Allstate that would reasonably lead the homeowner to believe the insurer would waive the limitation period, this Court reversed the trial court's judgment denying Allstate's motion for summary judgment. *Id.*

This is the same reasoning applied by the trial court in the present case. During its oral ruling, the trial court explained, "the Court is constrained based on the record to find that it could not have been reasonably believed based upon the objective facts, including the repeated statements by Allstate that it was relying on and requiring compliance with the policy provisions, that it was waiving (sic) its reliance and ability to assert the suit limitation." (T-5). The trial court noted that "commencing in May, 2006, and throughout the course of the proceedings, the communications between Ms. Willis and Allstate were prefaced on the part of Allstate by the specific statement that 'We are not waiving any defenses. We expect our insured to comply with all terms and conditions.' That was repeated on various occasions." (T-3-4).

The trial court's reasoning is supported by the facts in the record. Allstate sent correspondence to Ms. Willis and her counsel on ten (10) separate occasions notifying her that Allstate was reserving all its rights under the Policy and that Allstate would require strict compliance with the Policy terms. (R-110-124, 128-136). On November 29, 2007, Allstate specifically advised Ms. Willis that Allstate would not further consider any of the three claims. (R-124). On December 4, 2007, Allstate's counsel reiterated that Allstate would not further consider her claims. (R-132-134). When Ms. Willis hired an attorney in 2008, Allstate advised Ms. Willis' counsel that the suit limit had already expired and that Allstate would consider any lawsuit filed on her behalf frivolous. (R-135-136). The trial court properly relied on the *Sutton* case when granting summary judgment in favor of Allstate.

Many other cases have applied the same reasoning as that applied in *Sutton*. For example, in *Shelter America Corp. v. Georgia Farm Bureau Mutual Ins. Co.*, 209 Ga. App. 258, 433 S.E.2d 140 (1993), the insured contended that Georgia Farm Bureau waived the one-year contractual limitation provision by unnecessarily delaying negotiations and creating confusion regarding the value of the insured property, thus lulling the insured into a false sense of security that Georgia Farm

Bureau would not rely on the one-year suit limitation. In Shelter America, the parties were involved in preliminary settlement negotiations when Georgia Farm Bureau sent the insured a letter reserving its right under the policy. This Honorable Court affirmed the trial court's granting of Georgia Farm Bureau's motion for summary judgment on the basis that there was no showing in the record of any *affirmative statement or act* by Georgia Farm Bureau that would reasonably lead Shelter America to believe that the insurer would waive the contractual limitation. *Id.* at 259. In fact, this Court explicitly pointed out that Georgia Farm Bureau's correspondence to the insured specifically stated that no contractual limitations were waived and that Georgia Farm Bureau would insist upon strict compliance with its policy terms and conditions.

Similarly, in Universal Underwriters Ins. Co. v. Regional Sales, Inc., 849 F.Supp. 43 (N.D. Ga. 1994), a district court held that the insured's action was barred by the suit limitation in the policy. The court reasoned that when an insurer explicitly states that no contractual provisions are waived in its correspondence with the insured, then its communications with the insured are conditioned on the policy terms. In that case, Universal agreed to review additional information submitted by the insured several months after its initial denial of the claim and

after the expiration of the one-year suit limitation. Nonetheless, the court granted summary judgment in favor of the insurer. *Id.* at 46.

An insured cannot base a claim of waiver on their subjective belief. The test is whether the affirmative acts of the insurer would have “*reasonably*” led an insured to believe the insurance company would not require strict compliance with the policy terms. *Brown v. Nationwide Ins. Co.*, 167 Ga. App. 84, 85, 306 S.E.2d 62 (1983). This is an objective standard. Here, the trial court properly determined it would not have been reasonable for Ms. Willis to believe Allstate would not require strict compliance with the policy terms.

B. The *Ogden* Case Is Distinguishable In Several Respects.

Ms. Willis contends the trial court should have followed *Auto-Owners Insurance Company v. Ogden*, 275 Ga. 565, 569 S.E.2d 833 (2002). However, the *Ogden* case is easily distinguishable from the case currently before the Court. In *Ogden*, the insured made a claim with his homeowner’s insurer for damages caused by a fire. Auto-Owners admitted the fire loss was covered under the policy and executed a proof of loss stating the full cost to repair the house would be \$45,595. *Id.* at 566. Repairs on the house began and Auto-Owners paid over 70% of the cost of construction, which represented the actual cash value of the repairs.

Id. at 565. Several months after the loss, Auto-Owners requested certain documentation from the insured in order to pay the withheld depreciation on the claim. There were factual disputes between the parties concerning whether or not Auto-Owners had already promised to pay the withheld depreciation, whether or not Auto-Owners had, in fact, mailed the check for the withheld depreciation and whether a settlement had been reached between the parties. *Id.* at 566. The Supreme Court determined that these factual disputes precluded summary judgment on waiver. *Id.*

In the present case, Allstate did not admit the losses at issue were covered under the policy or make payments toward reconstruction of the home. Here, Allstate investigated Ms. Willis' claims and ultimately denied all three claims based on the insured's failure to cooperate in the claims process and based on material misrepresentations she made during her Examination Under Oath. (R-124, 132-133). The trial court properly determined that the result in this case should not be the same as the result in *Ogden*. Similarly, this Honorable Court has previously refused to apply *Ogden* to a case that was factually distinguishable. See *Stone Mountain Collision Center v. General Cas. Co. of Wisconsin*, 307 Ga. App. 394, 395-396, 705 S.E.2d 163 (2010).

2. **The Trial Court Properly Determined No Action On the Part of Allstate Constituted Waiver.**

Both the legislature and the appellate courts of this State have set forth a number of examples of conduct in which insurance companies may engage without the risk of waiving the suit limitations in their policies. For example, O.C.G.A. § 33-24-40 specifically provides that insurance companies may: acknowledge receipt of notice of a loss or claim under a policy; furnish forms for giving information relative to a loss or claim; investigate any loss or claim under a policy of insurance; and engage in negotiations looking toward a possible settlement of any loss or claim. Without limitation, none of these acts shall be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer under the policy. *Id.*

Similarly, many Georgia cases have found that the actions of insurers in handling claims did not constitute waiver of their policy's suit limitation. See *Morrill v. Cotton States Mutual Ins. Co.*, 666 S.E.2d 582, 585 (2008); *Cambridge Mut. Fire Ins. Co. v. Okonkwo*, 218 Ga. App. 59, 460 S.E.2d 302 (1995); *Georgia Farm Bureau Mut. Ins. Co. v. Nolan*, 180 Ga. App. 28, 29, 348 S.E.2d 554 (1986). For example, in *Brown v. Nationwide*, 167 Ga. App. 84, 306 S.E.2d 62 (1983), the

trial court directed a verdict in favor of Nationwide based on the one year suit limitation in the policy. The evidence showed that Nationwide investigated its insured's claim, requested more information from its insured about the claim, deposed its insured and responded to inquiries from the Georgia Insurance Commissioner. This Court found that the actions of Nationwide did not waive the one year suit limitation in the policy and affirmed the directed verdict for Nationwide. *Id.* at 85.

In *Universal Scientific, Inc. v. Safeco Insurance Company of America*, 174 Ga. App. 768, 331 S.E.2d 611 (1985), Universal suffered a water loss and submitted a claim to its insurer. Safeco admitted liability for certain damages and paid for those damages. However, there was a dispute as to the extent of the covered damages. Safeco offered to have certain property tested to determine whether it was, in fact, damaged by water or high humidity. However, the insured did not take Safeco up on its offer. Instead, the insured filed suit one day after the expiration of the one year limitations period.⁶ This Court held that Safeco's offer

⁶/ *Universal* was later superseded by statute, but only the portion of the case which deals with the computation of days within a limitation period, which is not

to test the allegedly damaged property was not an act which would have reasonably caused the insured to believe Safeco intended to enlarge the limitation period in the policy. *Id.* at 771-772. Since Safeco did not waive the one year suit limitation, the trial court granted summary judgment for Safeco and this Court affirmed.

Also, in *American Mutual Fire Insurance Company v. Coats*, 620 F. Supp. 768 (S.D. Ga. 1985), the district court enforced a one-year suit limitation on a homeowners policy and ruled that an insurer's actions of investigating and corresponding about a claim for over sixteen months did not constitute a waiver of the suit limitation. The court reasoned that where there is no evidence the insurer admitted liability or entered into a settlement, there is no waiver of the limitation. The court rejected the insured's position that the insurer waived the provision by never telling them that they would not pay their claim. *Id.* at 770.

Another case in which a policy limitations period was upheld is *Stapleton v. General Accident Insurance Co.*, 236 Ga. App. 835, 512 S.E.2d 645 (1999). Therein, Stapleton suffered water damage to her bed-and-breakfast and informed

at issue herein. See *Sanders v. Allstate Ins. Co.*, 207 Ga. App. 461, 428 S.E.2d 575 (1993).

her insurer of the loss. The adjuster approved moneys for structural repair and sent Stapleton an advance on her contents claim. Further payments were conditioned on the insurer receiving certain documentation. *Id.* at 837. The parties remained in contact, and the insurer continued to request documentation to complete Stapleton's claim. In her deposition, Stapleton testified she did not recall whether her insurer specifically promised to pay, but it was her understanding that her insurer would settle with her because the adjuster said her claim was being negotiated and the insurer was simply waiting for the proper documentation. *Id.* at 838. In an affidavit filed in response to the insurer's motion for summary judgment, Stapleton stated she did not file suit because the adjuster assured her that GAIC would pay all of her claim. This Court noted:

We cannot agree that an issue of fact remains on whether (the insurer) waived its two-year contractual limitation period. The evidence shows only that (the insurer) continued to negotiate with Stapleton, waiting for documentation supporting her contents claim. "Merely negotiating for a possible settlement of a disputed claim which is unsuccessfully accomplished is not conduct designed to lull the claimant into a false sense of security and does not preclude an

assertion of the contractual” suit limitation period. Rather, to conclude that the policy limitations have been waived or estopped, there must be an *affirmative promise or other act* waiving the limitation, or an actual or constructive fraud leading the insured to believe the limitation (period) would be enlarged, or lulling him into the security of actually thinking (that) the claim would in fact be paid without suit.

Id. at 837 (emphasis added)(internal citations omitted).

“Evidence that [an insurance company] investigated and offered to settle does not suggest that it tried to trick [its insured] into believing that it intended to enlarge ... the limitation period.” *Ga. Farm Bureau Mut. Ins. Co. v. Pawlowski*, 284 Ga. App. 183, 184, 643 S.E.2d 239 (2007). There must be some *affirmative promise, statement or other act* on the part of the insurer which would reasonably lead the insured into believing the insurer intended to enlarge the limitation period contained in the policy. *Suntrust Mortgage, Inc. v. Georgia Farm Bureau Mut. Ins. Co.*, 203 Ga. App. 40, 42, 416 S.E.2d 322 (1992). Without such evidence, summary judgment may be granted to the insurer. *Draughn v. USF&G Co.*, 144 Ga. App. 272, 274-75, 241 S.E.2d 52 (1977).

Here, there was simply no affirmative act on the part of Allstate, which could have reasonably lulled Ms. Willis into believing that Allstate was going to enlarge the limitations period in the Policy or pay her claim without suit. The only allegations made by the Appellant are: (1) that Allstate took “control” of her home with a lockbox; (2) that Allstate requested and accepted damage estimates and receipts from Ms. Willis; (3) that Allstate failed to pay Ms. Willis for her additional living expenses; (4) that Allstate made “statements” that led her to believe her claim was being processed; (5) that Allstate negotiated with Ms. Willis; and (6) that Allstate continues to accept premiums from Ms. Willis. (Brief of Appellant, pp. 3-4, 17-18).⁷

Assuming that all of Ms. Willis’ allegations are true, the only allegation that would even be relevant to Appellant’s waiver argument would be the alleged “statements” made by someone at Allstate. However, Ms. Willis has failed to

^{7/} The burden is always on the Appellant in asserting error to show it affirmatively by the record. *Goad v. Walker County*, 149 Ga. App. 532, 254 S.E.2d 483 (1979). Here, the Appellant fails to give record citations in support of any of her allegations.

provide any specificity regarding the substance of the alleged statements as needed for this Court to evaluate the potential effect of the statements. See Zampatti, 235 Ga. App. at 336. Moreover, under Georgia law, a claims adjuster is not authorized to waive a contractual limitation period without express authority from the insurance company. Stone Mountain Collision Center v. General Cas. Co. of Wisconsin, 307 Ga. App. 394, 397, 705 S.E.2d 163 (2010). If an insured cannot point to evidence that such authority existed, there can be no waiver. *Id.* Here, Ms. Willis has not even identified the Allstate representative with whom she dealt, much less pointed to any evidence the representative had the express authority of Allstate to waive the contractual limitation period in the policy. Accordingly, there can be no waiver.

Even if the Allstate adjuster handling Ms. Willis' claim had express authority to waive the suit limit, *which was not the case*, the effect of the alleged "statements" would have to be viewed **objectively** in combination with the other facts of the case, including the multiple reservation of rights letters and Allstate's denial of the claims. There is simply no evidence that Allstate waived the two year suit limit in the policy.

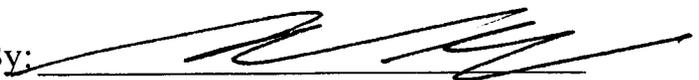
3. **Conclusion**

WHEREFORE, Appellee Allstate Insurance Company respectfully requests that the trial court's Order granting summary judgment in its favor be AFFIRMED.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed as follows:

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This 30th day of April 2015.

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