THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-1787

Grange Mutual Casualty and Trustgard Insuarance Company,. . . . . .Respondents,

v.

20/20 Auto Glass, LLC,. . . . . .Appellant.

REPLY BRIEF OF APPELLANT

Joshua M. Henderson
HENDERSON, BRANDT & VIETH, P.A.
360 East Henry Street, Suite 101
Spartanburg, South Carolina 29302
(864) 582-2962

Charles J. Lloyd
Livgard & Lloyd PLLP
2520 University Ave SE, Suite 202
Minneapolis, MN 55414
(612) 825-7777
Attorneys for Appellant 20/20 Auto Glass, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Secondary Authorities

INTRODUCTION

In their brief, Grange Mutual and Trustgard Insurance do not present the Court with a basis to affirm the trial court's judgment. The stipulated facts of this case are compelling and demonstrate conclusively that (a) neither party intended to be bound by the "offers" made by Grange; (b) there was no consideration for the alleged contract; and (c) the statute cited by Grange, South Carolina Code §38-57-75, conclusively establishes that there can be no binding agreement between Grange and 20/20 in this instance. Accordingly, the trial court's judgment should be reversed.

ARGUMENT

1. Neither Grange nor 20/20 intended to be bound.

As Grange points out in its brief, the South Carolina Supreme Court has held that a unilateral contract requires, among other things, "a specific offer." *Prescott v. Farmers Telephone Co-Op, Inc.*, 335 S.C. 330, 337, 516 S.E.2d 923, 926 (1999). The "contract" in this instance fails on this critical threshold requirement. Grange never addresses the fact that its written "offers" are not specific. As noted in 20/20's opening brief, the fax offer sheets contain at least two indications that the offers

are not for a specific price. (*See* R. pp. 147, 160, 168; Exhibits D, J and N). The offers provide for the possibility that the price charged by 20/20 could exceed $1,000 and that if it did so, it would have to obtain approval for that price. That certainly indicates that if the price charged by 20/20 is less than $1,000, no additional approval is required.[1] It also indicates Grange understood that 20/20 was not bound by pricing offered in the fax; if 20/20 were bound by that pricing, Grange would know that the amount charged would not exceed $1,000 and thus would not have to provide for that contingency.

Moreover, the fax "offers" specify if 20/20 was to include other charges beyond what was specified, it should contact Grange's third-party administrator about those charges. Again, if Grange had intended to bind 20/20 to the pricing contained in the faxes, there would have been no provision at all for 20/20 to include other charges in its billing. Plainly, what was stated in the faxes *in this case* did not

---

[1] The Collins and Gregg referral sheets, Exhibits J and N (R. pp. 160, 168), state a specific price that Grange states it is willing to pay as opposed to just a pricing formula as is the case in the Hampton referral, Exhibit D (R. p. 147). Even though those two offers provide prices of $248 and $254.16, both state "If the cost of the claim is over $1000, please call or email Pricing Approval."

constitute "specific offers" sufficient to form the basis of a unilateral contract.

The house painting analogy that Grange uses from a Texas case illustrates this point perfectly. Grange Brief at 9 *citing Vanegas v. American Energy Serv.*, 302 S.W.3d 299, 303 (Tex. 2009). There, the analogy was a homeowner offering to pay a painter $50 if the painter paints the homeowner's house. That is not what occurred in this case. Here, if Grange's offer to 20/20 were applied to painting the homeowner's house, the homeowner's offer would be that she would pay $50 to paint the house, but the painter should contact the homeowner if the cost of the job exceeds $100 and if there were additional costs for items like additional materials. That is not a sufficiently definite offer to establish a unilateral contract upon performance.

Grange's conduct post-performance by 20/20 further demonstrates that the offer was not intended to be binding. The undisputed evidence shows that Grange never paid the amount that was set forth in its offers. Grange claimed in its brief that "In accordance with all of its communications before the work was performed, Grange sends payment for an amount less than 20/20's invoice *but in an amount previously*

communicated by Grange." Grange Brief at 6 (emphasis added). That claim is flatly untrue. The record demonstrates without ambiguity that Grange never paid the amount it communicated to 20/20; it always paid more, further evidencing that Grange did not intend its offers to bind 20/20 to the pricing communicated. Grange is conspicuously silent on this fact in its brief.

Similarly, 20/20 never intended to be bound by the terms of the faxes. 20/20 rejected the pricing when it was offered generally, it rejected the pricing when it was offered over the telephone, it did not follow the specified billing instructions contained in the faxes and it did not use the rates specified in the faxes. In other words, it ignored, nearly in their entirety, the terms provided by Grange. Even so, Grange never rejected 20/20's invoices as being non-compliant. Again, Grange never addresses that fact.

Because there is no evidence showing that either Grange or 20/20 intended to be bound by the terms of Grange's fax confirmations, the trial court's conclusion that a contract was formed when 20/20 performed work for its customers was plain error. As this Court has noted previously: "a contract only arises when there is an actual

agreement by the parties in which the parties demonstrate a mutual intent to be bound." *Electro Lab of Aiken v. Sharp Constr.*, 357 S.C. 363, 369, 593 S.E.2d 170, 173 (S.C. App. 2004).[2] That analysis is completely consistent with the Supreme Court's requirement that there must be a meeting of the minds "with regard to all essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). Because the evidence here demonstrates no meeting of the minds and no intent to be bound, no contract – unilateral or otherwise – could have been formed. The trial court's determination to the contrary constitutes reversible error.

2. As a matter of law, no consideration exists for the "agreement."

A unilateral contract requires consideration. In the present case, there is no consideration because Grange did nothing more than what it was already obligated to do. That is not consideration to support its claim of a binding contract with 20/20.

---

[2] *Electro Lab* is of further significance because it cites favorably the Restatement (Second) of Contracts. As 20/20 argued in its opening brief – without response from Grange – under the Restatement, 20/20's actions would not have constituted acceptance of Grange's offer and no contract would have been formed. Yet another reason the trial court's decision in this case should be reversed.

Grange's argument with respect to the consideration issues is tortured at best. It argues because it elected to pay 20/20 directly, that was consideration for the unilateral contract. That position has no support at all in the record. Nowhere in Grange's "offer" does it promise to pay 20/20 directly, as opposed to paying the policyholder; the confirmation faxes that form the "offers" only indicate when payment will be made, not to whom. (*See* R. pp. 147, 160, 168; Exhibits D, J and N, "Payment will be rendered upon receipt of funds from the client."). Consideration has to be stated in the offer. "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Prescott v. Farmers Telephone Co-op*, 335 S.C. 330, 336, 516 S.E.2d 923 (1999) *quoting Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (S.C. App. 1993) and Restatement (Second) of Contracts § 29 (1981). Because it did not include the promise to pay the funds to 20/20, that payment cannot constitute consideration for the agreement.

In reality, the payment was made to 20/20 not as consideration for the "agreement," but because of the assignment that was executed by 20/20's customers. (*See* R. p. 96; Stipulated Facts ¶ 35, "I assign any

and all insurance claims and all policy proceeds owed by my insurance company in connection with my damaged glass to 20/20 Auto Glass, to be paid directly to them."). Upon execution of the assignment, there was no election for Grange to make about whom to pay – if such an election ever existed – because the policyholder properly assigned the proceeds to 20/20.

Grange's claim that it has the ability to choose whom to pay is not at all supported by the policy language cited and is contrary to law. The language that Grange may elect to pay to repair or replace the damaged property does not determine the payee of what is owed, but rather reflects the ability of Grange to pay the repair or replacement cost as opposed to buying the vehicle from the policyholder under the actual cash value provision of the limit of liability. (*See* R. p. 133, 91-92; Exhibit A, p. D-4 and Stipulated Facts ¶ 10). Given that the policyholder retains the ability to determine what shop will perform the work under South Carolina Code 38-57-75, Grange cannot claim an ability to pay a repair facility directly because that would presume that Grange may select the repair facility. Moreover, Grange cannot claim that it has the legal ability to bypass the policyholder with its payment

absent either a directive or consent to do so. The debt that Grange was obligated to pay became fixed at the moment of damage and could be freely assigned and sold by the policyholder. *Narruhn v. Alea London Ltd*, 404 S.C. 337, 344, 745 S.E.2d 90, 94 (2013). As a matter of law, that prevents Grange from bypassing the policyholder with its payment.

At its core, Grange's contractual obligation under the insurance policy is to pay the amount necessary to repair or replace the policyholder's damaged glass. If that is all that it paid to 20/20, it did nothing more than what it was legally obligated to do, which cannot form the basis of consideration for a contract. The only thing that Grange points to as being beyond its pre-existing legal duty is that the payments were made directly to 20/20, something that was not included in its offers and was in fact compelled by the policyholders' assignments. That is not consideration sufficient to support the formation of a binding contract.[3] Given that the trial court failed to

---

[3] While Grange attempts to minimize the analysis provided by United States District Judge Patrick Schiltz in his on the record ruling that facts identical to these do not create unilateral contracts – even when viewing those facts in a light most favorable to the insurance company on a motion for summary judgment – it neither addresses that court's analysis nor cite's any contrary authority. *See* Grange Brief at 21, n. 8. While it references in passing *Southern Glass & Plastics Co. v. Kemper*,

identify any consideration for the agreement, it was reversible error for the court to conclude that a binding contract was formed on these facts.

3. South Carolina Code § 38-57-75 proves there is no unilateral contract.

Grange's final defense of the trial court's judgement is to cite to South Carolina Code § 38-57-75 and claim that the legislature somehow codified the Court's decision in *Kemper*. Grange Brief at 23-24. In fact, the statute makes clear that no unilateral contract is possible.

Section 38-57-75(E)(1) provides that if a glass shop, in this instance, 20/20, refuses to accept the insurer's proposed reimbursement rate, the policyholder may be informed that the policyholder "will be responsible for additional costs." This is significant with respect to this case for two reasons: one, it provides 20/20 with the statutory ability to reject Grange's proposed pricing; two, it establishes that 20/20 cannot be bound by those prices through some other means because the policyholder may be responsible for additional charges. If Grange had the ability to bind 20/20 to its pricing, the policyholder would never be

---

399 S.C. 483, 732 S.E.2d 205 (S.C. App. 2012), that case did not address any claim of lack of consideration. That fact is also true with respect to all of the cases from outside of South Carolina cited to by Grange that 20/20 distinguished in its opening brief. Grange therefore cites to no authority at all in support of its consideration position.

responsible for some additional amounts – the "offers" do not purport to limit themselves to what Grange will reimburse but rather attempt to place a limit on what 20/20 will charge. If the offers in fact led to a binding contract, 20/20 would be foreclosed from pursuing anyone for additional amounts beyond what Grange promised to pay. Yet, Grange acknowledges in its brief that Grange informed its policyholders that they may be responsible for some amounts out of pocket if they chose to have 20/20 replace their damaged glass. Grange Brief at 24. (*See also* R. p. 95; Stipulated Facts ¶30).[4]

Grange tries to contend that the statute somehow gives it the ability to set whatever pricing it wishes. Grange Brief at 24, n. 10. Unfortunately for Grange, the statute only applies to administrative requirements and not policy requirements. Section 38-57-75, provides that "[v]iolations of this section are subject to the provisions of the South Carolina Insurance Unfair Claim Practices Act," S.C. Code Ann. § 38-59-20, *et. seq.* The South Carolina Supreme Court has held that jurisdiction over compliance with the Trade Practices Act and Claims Practices Act is vested with the Department of Insurance, not the

[4] This further evidences that Grange did not intend 20/20 to be bound by the faxed "offers."

courts. *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 415, 556 S.E.2d 371, 377 (2001).

Apart from the fact that Grange is attempting to use the statute for an impermissible purpose, the wording of the statute does not give Grange *carte blanche* to determine what constitutes "fair and reasonable." Were that to be the case, it would render the terms "fair and reasonable" completely meaningless; the phrases "the insurer's rate" and "the insurer's fair and reasonable rate" would have identical meaning. That cannot be presumed to be the legislature's intent. Thus, Grange's effort to take a statute that is to regulate and restrict an insurer's conduct and turn it into something permissive fails.

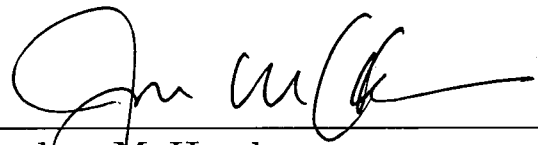
CONCLUSION

The stipulated facts demonstrate that this case does not present a situation where a unilateral contract exists. The wording of the "offers" that were made demonstrate that Grange did not intend to bind 20/20, as did both its words to the policyholders and its subsequent payments, which were all greater than what was proposed. Similarly, 20/20 at all times demonstrated that it did not intend to be bound by Grange's "offers." Moreover, Grange did not promise 20/20 to do anything that it

was not already legally obligated to do in exchange for 20/20's performance of the work. As a result, the effort to form a contract would fail for lack of consideration. Finally, the statute that Grange cites to justify the trial court's decision actually precludes there being a unilateral contract.

For all of those reasons, as well as the reasons set forth in its opening brief, 20/20 Auto Glass respectfully requests that the judgment of the trial court be reversed and the case remanded.

Respectfully submitted,



Joshua M. Henderson
HENDERSON, BRANDT & VIETH, P.A.
360 East Henry Street, Suite 101
Spartanburg, South Carolina 29302
(864) 582-2962

Charles J. Lloyd
Livgard & Lloyd PLLP
2520 University Ave SE, Suite 202
Minneapolis, MN 55414
(612) 825-7777
Attorneys for Appellant 20/20 Auto Glass, LLC

October 26, 2017

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing brief complies with Rule 211(b), SCACR.

October 26, 2017

Joshua M. Henderson
360 East Henry Street, Suite 101
Spartanburg, SC 29302
(864) 582-2962
Attorneys for Appellant