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 Insurance Company,. . . . . .Respondents,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in concluding that a unilateral contract was formed when the stipulated facts show no intention of the parties to be bound by the terms of the stated offer?

II. Did the trial court err in concluding that a unilateral contract was formed when there was no consideration for the alleged contract?

III. Did the trial court err in relying on *Southern Glass & Plastics v. Kemper*, because it is distinguishable and because *Narrhun v. Alea London Ltd.* has changed the legal landscape?

STATEMENT OF THE CASE

The case comes to this Court on appeal from a judgment of the Anderson County Court of Common Pleas, Hon. R. Scott Sprouse presiding. The declaratory judgment action below was commenced on August 21, 2014 by Grange Mutual Casualty and Trustgard Insurance Company against 20/20 Auto Glass, LLC, after 20/20 invoked an appraisal remedy to resolve disputes over reimbursements of a handful of claims for replacement of broken automobile glass. The matter was tried to the court below, without a jury, on October 26, 2016 on stipulated facts submitted by the parties. On December 6, 2016, the trial court entered its order for judgment in favor of the insurers and against 20/20, declaring that 20/20 was contractually bound to the insurers' reimbursement rates because it accepted those

rates when it performed the work and created a unilateral contract with the insurers, that 20/20 was not underpaid and the insurers owed 20/20 nothing further on the glass claims at issue, that the insurers did not breach the terms of their insurance policies and that the insurers were not obligated to participate in the appraisal process as demanded by 20/20. On December 16, 2016, 20/20 timely moved the trial court to alter, amend or reconsider its order. The court denied that motion on January 18, 2017. 20/20 timely served its notice of appeal on February 10, 2017.

FACTS

This is a dispute over how Grange Mutual and Trustgard Insurance reimburse 20/20 Auto Glass for claims arising out of the replacement of broken automobile glass. Although there is a contract which specifies both the insurers' reimbursement obligation and the mechanism by which disputes are to be resolved, the insurers in this instance sought to bind 20/20 to a process not contemplated by the insurance contract.

The facts underlying the appeal were stipulated to by the parties and are not in dispute. 20/20 Auto Glass is a small South Carolina limited liability company in the business of repairing and replacing damaged automobile glass. (R. p. 91; Stipulated Facts ¶ 2). For customers who have insurance coverage for damaged glass, 20/20 receives an assignment of the insurance proceeds owed by the

insurance company as payment by the customer for the work performed. (R. p. 96; Stipulated Facts ¶ 35). 20/20 then bills and collects from the insurance company directly. (*See, e.g.*, R. p. 99; Stipulated Facts ¶¶56-57). That is exactly what occurred in each instance at issue in this action. (R. pp. 98-105; Stipulated Facts ¶¶ 49-100.

As part of the process, 20/20 and its customer, the Grange policyholder, notify Grange of the claim by contacting Safelite Solutions, Grange's third-party administrator. (R. pp. 94, 91; Stipulated Facts ¶¶ 25, 6). During the telephone call where the report is made, Safelite, on Grange's behalf, proposes pricing for the glass replacement work. (R. p. 97; Stipulated Facts ¶ 44). 20/20 expressly rejects pricing it finds to be unreasonable. (R. pp. 94, 95; Stipulated Facts ¶¶ 26, 32). 20/20 also sent a letter to Safelite prior to any of the claims at issue here, stating specifically that 20/20 rejects any effort by Safelite to set prices and that all future offers of pricing are rejected absent a written agreement signed by someone acting for 20/20. (R. pp. 95, 145; Stipulated Facts ¶ 32, Exh. C). The letter further notes that the rejection of the rates will be manifested by the invoice submitted by 20/20 for the work performed.

Notwithstanding the fact that 20/20 has rejected the pricing in writing and verbally over the telephone when the claim is reported, Grange, through Safelite, sends by fax a claim confirmation/referral sheet which again sets forth the pricing

Grange seeks to pay for the work. (R. pp. 95-96, 147, 160, 168; Stipulated Facts ¶ 33, Exhibits D, J and N). The referral sheets contain contradictory information about pricing. On the one hand, they state that "Performance of the services constitutes acceptance of the communicated price and billing instructions." On the other, they indicate that if the cost of the claim is going to exceed $1000 – the quoted price in the notification form in this case is always less than $1000 – then approval needs to be obtained from Safelite. The referral sheets also indicate that the glass shop should contact Safelite, Grange's third-party administrator for, among other things, "other charges." That language is curious because if the price had been intended to be binding, there would be no "other charges" and it would not be possible for the claim to exceed $1000.

20/20 then performs the replacement work for its customer. Instead of accepting Grange's pricing offer, 20/20 is paid by its customer through the customer executing an assignment of the insurance proceeds owed. (R. p. 7; Stipulated Facts ¶ 35). Significantly, the insurance coverage is property damage insurance, it is not a reimbursement insurance. The insurance company owes a debt to the policyholder immediately upon the damage being sustained, whether or not the damage is ever repaired. The policyholder, 20/20's customer, transfers that debt to 20/20 via the assignment in payment of the work performed. 20/20 then submits its invoice for the work to Grange. In each instance at issue here, 20/20

did not comply with either the billing instructions or the pricing provided by Grange in the confirmation documents. The submission of the invoice was the one and only way 20/20 notified Grange that the work had been performed.

The existence and validity of the assignments is not in dispute. Grange paid 20/20 directly in accordance with the assignment of proceeds. (R. pp. 99, 101, 103, 104, 105; Stipulated Facts ¶¶ 57, 71, 83, 87, 93, 98). The dispute arises because Grange paid less than the amount invoiced.[1] Subsequent to trying to resolve the dispute by sending follow up invoices (*see, e.g.*, R. pp. 100, 155-56; Stipulated Facts ¶¶ 59-60 and Exh. H), 20/20 sent a demand to appraise the loss to resolve the dispute. (*See, e.g.*, R. pp. 100, 158; Stipulated Facts ¶ 61, Exh. I). Grange responded to the demands for appraisal by commencing this action.

ARGUMENTS

Although there were multiple issues associated with the underlying action, the trial court resolved all of those issues by its determination that a unilateral contract was formed when 20/20 performed glass replacement services for its customers. (*See* R. pp. 11-12; Order, Conclusions of Law at ¶¶ 8-11). In essence, once it was determined that there was a unilateral contract in place, that conclusion resolved whether Grange fulfilled its contractual obligations to its policyholders and whether 20/20 had any ability to demand an appraisal. As a result, 20/20

[1] The dispute between the parties on the claims presented here involves only the appropriate amount to be paid for the glass replacement, not whether replacement was necessary.

addresses only the unilateral contract issue in this appeal. Should the Court agree with 20/20 that no unilateral contract was created, the case would need to be remanded to the trial court to address the merits of the remaining issues presented by the declaratory judgment action and the counterclaim.

With respect to the issue presented, because the case was decided on stipulated facts, the Court reviews the issue *de novo* and gives no deference to the trial court's legal conclusions. *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000)("When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts."); *J.K. Constr. Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999)(where an appeal arises on stipulated facts, "the appellate court owes no particular deference to the trial court's legal conclusions.").

I. The trial court erred in finding a unilateral contract because there was no acceptance and no intent to be bound.

The trial court erred in concluding that there was an acceptance of Grange's offer by 20/20 such that a contract was formed binding 20/20 to the amounts proffered by Grange. As a matter of law, there was no acceptance and no intention to be bound.

The concept that an offer can be accepted by performance is well recognized in South Carolina and elsewhere. That acceptance, however, can be limited in two circumstances, both of which are present here. In addressing what the trial court

referred to as a unilateral contract – a contract that invites acceptance by performance – the Restatement (Second) of Contracts provides that "Except as stated in § 69, the rendering of performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance." Restatement (Second) of Contracts § 53(2). Similarly, the next subsection of the Restatement states: "Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute an acceptance if before the offeror performs his promise the offeree manifests an intention not to accept." *Id.* 53(3). In the present case, the facts show that 20/20 notified Grange, both directly and through Grange's third-party administrator, that it was not accepting the proposed pricing and it did so (a) within a reasonable time and upon the exercise of reasonable diligence and (b) prior to the time Grange performed on its promise, the issuance of payment. In other words, the facts show conclusively that, in this case, performance did not constitute acceptance of the proposed pricing terms.

First, 20/20 expressly rejected the pricing it was offered on the telephone when the claim was reported by 20/20 and its customer to Grange through the third-party administrator. (R. pp. 94, 95, 97, 98; Stipulation of Facts ¶¶ 26, 32, 45,

49). Even before the work was done, before the confirmation fax was sent, Grange was on notice that 20/20 was not accepting the proposed pricing.

Second, 20/20 notified Grange's third-party administrator in writing that 20/20 was not accepting the pricing laid out in the fax confirmations and would not negotiate pricing with claims administrators. (R. pp. 95, 145; Stipulation of Facts ¶ 32, Exhibit C). In that letter, 20/20 is explicit in its rejection of any effort to bind the company to pricing:

> 20/20 Auto Glass has received your communication purporting to assign a glass replacement job to our company. Every aspect of the communication is rejected in its entirety. ...
>
> ...
>
> Third, we reject the pricing that is set forth in your communication. Given the totality of the circumstances, including the fact that you are a stranger to this transaction, you have no ability to bind either 20/20 Auto Glass or our customer to any pricing absent our express agreement. We have already verbally rejected the pricing when the claim was reported. We are further manifesting our rejection of the pricing in both this letter and in our invoice for this job. Absent a written agreement signed by an authorized representative of 20/20 Auto Glass, all future offers of pricing that are faxed to us are also rejected.

(R. p. 145; Exhibit C).

Third, at the time that 20/20 notified Grange that 20/20 had completed the work on its customer's vehicle, 20/20 indicated that it did not accept the offer. The fax setting forth the "offer" specifies that "Performance of services constitutes acceptance of the communicated price and billing instructions." (*See, e.g.*, R. pp.

147, 99; Exhibit D and Stipulation of Facts ¶ 53). The notification that the work was performed – 20/20's submission of its invoice – complied with neither the communicated price nor the billing instructions. (*See* R. p. 151; Exhibit F). 20/20 did not have the customer sign its invoice as it was instructed to do so by the fax confirmation. Similarly, 20/20 did not have the customer sign the fax confirmation as it was instructed to do.

Any change in the terms of the offer by the offeree constitutes a rejection of the offer and amounts to a counteroffer. *Alpine Glass Inc. v. Ill. Farmers Ins. Co.*, 643 F.3d 659, 666 (8th Cir. 2011), quoting *Markmann v. H.A. Bruntjen Co.,* 249 Minn. 281, 81 N.W.2d 858, 862 (1957)("If the purported acceptance changes the terms of the offer, 'it is not positive and unequivocal, and constitutes a rejection of the offer and a counteroffer.'"). In that case, the court determined that a glass company that did not follow the terms of the unilateral contract offer did not accept the offer by performance.

20/20 acknowledges that this Court previously distinguished the Eighth Circuit decision in *Southern Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (S.C. App. 2012). In that case, the Court wrote:

> In those cases, the courts noted that the company had merely stated that billing at those rates would result in timely payment. The present case is more in line with the North Carolina, Idaho, and Washington cases. In this case, Kemper notified Southern Glass of the rates and stated "performance of services irrevocable constitutes acceptance of the above price and billing instructions." Additionally, Southern Glass

> accepted the prices in the phone conversation. By proceeding with the work after receiving notice of the prices via phone conversation and fax, Southern Glass accepted the prices.

Southern Glass, 399 S.C. at 497, 732 S.E.2d at 212 (distinguishing both the Eighth Circuit opinion in *Alpine Glass* and a Connecticut Supreme Court decision in *Auto Glass Express v. Hanover Ins. Co.*, 293 Conn. 218, 975 A.2d 1266 (2009)). The problem, at least with respect to the Court's attempt to distinguish *Alpine*, is that the Court was flatly wrong about the offer made by Farmers to Alpine; the facts in that case are essentially identical to the facts here. In its brief to the Eighth Circuit, Farmers wrote the following with citations to the record before the United States District Court:

> Alpine received confirmation of the prices offered by Farmers in a variety of ways. In addition to the blast faxes, when a claim was called in to Safelite, Safelite confirmed by telephone Farmers' price terms with an Alpine representative, if available. (A.110 at ¶14; A.140 at ¶13.) During this call, Safelite would tell the policyholder and the Alpine representative the prices that had been offered by Famers in the blast fax. (A.110 at ¶14; A.140 at ¶13.)
>
> Alpine also received confirmation of the price offers via facsimile, which itemized price for the specific claim. (A.110-11 at ¶¶15, 17; A.140-41 at ¶¶14, 15; A.145-48). When notified of a claim, Farmers confirmed its price to the glass shop by facsimile before the work started. (A.110-11 at ¶ 15; A.141 at ¶ 17.) In some cases, Alpine would verify coverage with Farmers or Safelite before beginning work. (A.111 at ¶17.) During the relevant time for this litigation (2003-2006), every Farmers' facsimile to Alpine included a confirmation of price terms and, under the price language, stated: "Performance of services constitutes acceptance of the above price." (A.111 At ¶16; A.141 at ¶16; A.145-48.)

Brief of appellant Illinois Farmers Insurance Company at pp. 1-15, *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, case number 10-1689 (filed May 27, 2010) (available at https://pacer.gov). This case is not merely similar to the case decided by the Eighth Circuit, it is identical.

Consistent with those sections of the Restatement, in South Carolina, in order for there to be a binding 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, 894 (1989), *citing Hughes v. Edwards*, 265 S.C. 109, 220 S.E.2d 231 (1975). In the present case, the evidence is quite clear that 20/20 stated clearly and repeatedly that it did not accept the pricing proposed by Grange. 20/20 did so before it performed the work and it did so after, prior to when Grange tendered its payment to 20/20. There was no acceptance and there was no meeting of the minds. Therefore, there was no contract.

That there was no meeting of the minds is further evidenced by additional facts in the record. For example, the fax confirmation sheets, the identified basis for the unilateral contract offer, while stating the maximum price that Grange is supposedly willing to pay also states that "if the cost of the claim is over $1000, please call or email Pricing Approval." (R. pp. 147, 160; Exhibits D and J). The lack of intent to bind the recipient is further demonstrated with the referrals where

they indicate "Please contact Safelite...prior to beginning the work for any ... OEM, dealer, net priced, premium, ***other charges*** and any molding parts."(emphasis added).

Grange, when it issued payments to 20/20, paid amounts different than the offered amount. For example, for the Hampton claim (R. pp. 98-100; Stipulated Facts ¶¶ 49-61), the referral sheet laid out the formula that Grange stated it was willing to pay. (R. pp. 99, 147; Stipulated Facts ¶¶50-53, Exhibit D). That formula works as follows:

NAGS Benchmark ($217.09, from Exhibit F) times 59% =	$128.08
Labor $30 flat plus $30/NAGS Hour (2.3 hours, Exhibit F) =	$ 99.00
Urethane kit $15 flat =	$ 15.00
Sales tax on materials 6% =	$ 8.58
Total =	$250.66

Grange paid 20/20 on this claim $290.53. (R. p. 99; Stipulated Facts ¶ 57). Had there been a unilateral contract created by 20/20's performance, the amount paid would have been $250.66. That the amount paid was different shows there was no meeting of the minds. The fact that Grange paid more than the alleged contract amount demonstrates that Grange understood the proposed pricing was not accepted by 20/20's performance of the replacement services.

Similarly, the Collins claim resulted in a payment different than the amount stated in the referral sheet that forms the basis for the unilateral contract claim. There, the referral sheet states a specific price to be paid, $248.00. (R. p. 160; Exhibit J). Notwithstanding the fact that Grange claims there was a contract formed when 20/20 performed the replacement of the Collins windshield, Grange paid a different amount, $302.21. (R. p. 101; Stipulated Facts ¶ 71). Again, the amount was more than the "contract" amount, demonstrating that Grange understood that its proposed pricing was not accepted by 20/20 when it replaced the damaged glass.[2]

A further problem with the trial court concluding that a valid unilateral contract was formed in this instance involves the fact that Grange is improperly attempting to modify its prior existing insurance contract obligation to its policyholder with its unilateral contract offer. In 2013, the South Carolina Supreme Court reaffirmed its view that an anti-assignment clause in an insurance policy does not preclude post-loss assignments. The Court held that when the loss has occurred – in the present case, after the vehicle has been damaged – the claim against the insurance company is vested and can be assigned:

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[2] The third and final claim for which there is a copy of the referral sheet in the record, the Gregg Impala claim (as opposed to the Gregg Mazda claim), also resulted in a payment different than what was supposedly agreed upon, although the difference on this claim is only $ 0.32. *Compare* Stipulated Facts ¶ 77 (R. p. 102) with ¶ 83 (R. p. 103).

> As a general principle, a clause restricting assignment [in an insurance policy] does not in any way limit the policyholder's power to make an assignment of the rights under the policy ... after a loss has occurred.... It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.

Narruhn v. Alea London Ltd., 404 S.C. 337, 344, 745 S.E.2d 90, 94 (2013)(quoting *Williston on Contracts* § 49:126 (4th ed. 2000)).

In this case, the damage to the windshield occurred prior to the insured contacting 20/20 or Grange. The claim under the policy was vested at the time the windshield was damaged; the amount due under the insurance policy and the debt owed by Grange was fixed at that point in time. Grange's entire unilateral contract argument focuses on events that happen after the loss occurred. Consequently, Grange is attempting to reduce its debt owed under the insurance policy that has already vested. The attempt to restrict its payment is an effort to prevent the assignment of the debt, the chose in action, which is plainly not permitted in South Carolina subsequent to *Narruhn*.

At its core, the scenario presented by this case is that 20/20 has two competing offers available to it relative to payment for its replacement services. On one side is the offer from the insurer to be paid at a particular price – an offer 20/20 expressly rejected. On the other side is the offer from the customer, Grange's policyholder, who will pay 20/20 by assigning the full amount of the policy proceeds owed by Grange. 20/20 is absolutely entitled to reject Grange's

offer and accept the offer from the customer without Grange being able to interfere in that bargain in any way. 20/20 could have agreed to Grange's pricing but it did not. The ability of the customer to assign her vested claim against Grange cannot be restricted by the insurer according to the Supreme Court in *Narruhn*. That is exactly what Grange is attempting in this instance.

There can be little question that if Grange made an offer to its policyholder to resolve the glass claim for $200, the policyholder could reject that offer. Grange could not then bind the policyholder by sending her a fax restating the $200 offer and stating that having the work completed constituted acceptance of the pricing offer. Instead, the policyholder would be entitled to the full amount owed under the terms of her insurance policy notwithstanding any effort by Grange to avoid that obligation. Yet, that is precisely what Grange is attempting to do here, only directing the offer to 20/20, who is standing in the shoes of the policyholder as a result of the assignment of insurance proceeds.

The specific facts of this case show that there was no proper acceptance of Grange's unilateral contract "offer," that 20/20 timely notified Grange that it was not accepting the pricing proposal demonstrating that both aspects of the Restatement's limitations on acceptance by performance have been satisfied, and that Grange acknowledged that 20/20 was not bound by the terms set forth in the referral documents, both by what was stated in the documents themselves and by

Grange's payments after the work was completed. The facts are fatal to Grange's claim that a contract was formed. When combined with the Restatement provisions, it is very clear that the trial court erred in finding the existence of a unilateral contract.

II. The trial court erred in finding a unilateral contract because there was no consideration for the agreement.

Moving beyond the offer and acceptance/meeting of the minds/intention to be bound issue, the fact that there is no consideration at all for this supposed agreement constitutes a second basis for reversal of the judgment below. Even assuming for the moment that there was a proper offer and that performance of the work constituted acceptance of that offer, Grange provided no consideration for the agreement. Consideration is an essential element of any contract, including unilateral contracts. *International Shoe Co. v. Herndon*, 135 S.C. 138, 133 S.E. 202, 203 (1926)("It is very true that mutuality of obligation is not an essential element in unilateral contracts....The nonrequirement of mutuality in such contracts, however, does not dispense with the necessity of a valuable consideration."). Accordingly, if there was no consideration, there was no contract.

The trial court's order for judgment in this case states that the unilateral contracts at issue were "supported by adequate consideration." (R. p. 13; Order, Conclusion of Law ¶13). It then concluded "Moreover, the unilateral contracts did

not lack consideration because 20/20 Auto Glass was ultimately paid the amount that Grange offered to pay." (R. p. 13, Order, Conclusion of Law ¶ 14). The problem with the trial court's conclusions with respect to consideration is that Grange merely offered *what it was already legally obligated to pay* by operation of its insurance contract with its policyholders.

In *Alpine Glass, Inc. v. Illinois Farmers Insurance Co.*, the United States District Court for the District of Minnesota decisively rejected the conclusion that is identical in every respect to trial court's conclusions here with respect to the issue of consideration. Transcript of Summary Judgment Hearing, No. 06-CV-1148 (PJS/RLE)(D. Minn. Mar. 30, 2007) *aff'd*, *Alpine Glass Inc. v. Ill. Farmers Ins. Co.*, 643 F.3d 659, 662 (8th Cir. 2011). Faced with the insurer's argument that faxes sent to independent glass shops constituted binding unilateral contracts with the glass shops when the shops performed the work, the court denied from the bench the insurer's motion for summary judgment and granted, *sua sponte*, summary judgment in favor of the glass shop.

The court in that case focused on the lack of consideration to form the agreement, specifically stating: "I don't think that the circumstances here come close to presenting a case of unilateral contracts being formed." Transcript at 48. Among other problems, the court noted that in these "contracts," the insurer was not agreeing to do anything for the glass replacement company that it was not

already obligated by law to do, therefore the "contracts" suffered from a fatal lack of consideration. "The way I see it, you send these letters off to people saying we will follow the law. Here, you have to charge our prices. In return what we are going to do is what we are already legally required to do. It doesn't sound like much of a deal from Alpine's perspective." (Transcript at 39-40).

The conclusion that there was no consideration in the *Alpine* is entirely consistent with the law in South Carolina. *City of Spartanburg v. Spartan Villa*, 273 S.C. 1, 5, 253 S.E.2d 501, 503 (1978)("A promise by a party to do that which it has already legally obligated itself to do is not a valid consideration."); *McLeod v. Sandy Island Corp.*, 265 S.C. 1, 11, 216 S.E.2d 746,750 (1975)("The authorities are clear that an agreement to do that which one is already legally bound to do is not sufficient consideration to support a contract."); *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 54, 135 S.E.2d 311, 315 (1964).

The same failure of consideration analysis applies here. Grange's obligation to the policyholder is fixed as of the time the damage is sustained. The insured is entitled to choose 20/20 to do work under South Carolina law, SC Code 38-57-75 (A), and is free to assign the proceeds of the policy as payment for the work. *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 444, 745 S.E.2d 90, 94 (2013). Under the terms of the referrals that are the basis of the unilateral contracts, at best what is promised is exactly what the insurer is already obligated to do under the law and

the terms of the insurance policy. At worst, it is an effort to do less than what is promised in the policy. 20/20 receives nothing in exchange from Grange for doing the work, demonstrating a complete lack of consideration for the alleged contract in this instance. That lack of consideration is fatal to the unilateral contract theory. The trial court's failure to acknowledge that Grange was only offering what it was obligated to pay under its insurance policy constitutes reversible error.

III. The trial court erred in relying on *Southern Glass & Plastics v. Kemper*, because it is distinguishable and because *Narrhun v. Alea London Ltd.* has changed the legal landscape.

The trial court relied heavily on this Court's decision in *Southern Glass & Plastics v. Kemper Ins. Co.* and the foreign cases cited in that decision. The facts of some of those cases are similar, but not identical to the facts here. In others of the cases, the facts are not similar at all. The differences in the facts between this case and all of those cited by the trial court, including *Southern Glass,* is what renders those other cases inapposite here.

In *Southern Glass*, the trial court relied on evidence that the glass company had agreed to the insurer's pricing during phone conversations and that the glass company had not contacted Safelite or the insurer to reject the pricing after receiving the faxed referral sheet. 399 S.C. at 497-98, 732 S.E.2d at 212-13. Here, the evidence shows that 20/20 rejected Grange's pricing proposals at every turn. The facts show that 20/20 specifically rejected Grange's pricing during the phone

calls with Safelite. (R. pp. 94, 95; Stipulated Facts ¶26, 32). As noted above, 20/20 also rejected the prices after receiving the faxed referral letters by submitting invoices in excess of the amounts in the referral letters and refusing to follow the billing instructions contained in the faxes. An additional fact that distinguishes this case from *Southern Glass* is that 20/20 wrote to Safelite putting it on notice that 20/20 was expressly rejecting the pricing in any future communications from Safelite absent an express written agreement to the contrary. (R. p. 95, 145; Stipulated Facts ¶ 32, Exh. C). 20/20 further emphasized its rejection of Grange's pricing by repeatedly emailing the insurer that it did not ever manifest intent to accept the stated prices. (R. p. 100, 155-56; Stipulated Facts ¶ 59, Exh. H, Stipulated Facts ¶ 60). The facts that were determinative in *Southern Glass* – the glass company accepting the prices on the phone and never expressly rejecting the prices – are all absent in the present case. Therefore, *Southern Glass* is factually distinguishable from the present case and should have no bearing on the Court's decision here.

Moreover, as noted above, the Supreme Court's decision in *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013), issued after this Court's opinion in *Southern Glass*, altered the legal landscape for cases such as this. The vesting of the claim at the time of the loss, when coupled with the consumer's right to choose a vendor to perform the replacement services without interference by the insurer,

South Carolina Code § 38-57-75(A) and (E)(2), effectively prevents Grange or any other insurer from making pricing offers to glass shops and forcibly binding those shops to those rates against their will if the shops perform the work. 20/20 had the ability to accept from its customers an assignment of the vested debt owed by Grange on each of these claims without Grange being able to interfere with that transaction. To conclude the contrary would permit Grange to offer pricing with the knowledge that 20/20 would never accept as a way of circumventing the statutorily protected consumer choice. Consequently, *Southern Glass* is inapplicable here both factually and legally.

The trial court also cited to *CIM Ins. Corp. v Cascade Auto Glass, Inc.*, 660 S.E.2d 907 (N.C. Ct. App. 2008), in support of its ruling. (R. p. 10; Order, Conclusion of Law ¶ 5, n. 3. That case involved another glass company along with several insurers' claims that unilateral contracts had been formed regarding the disputed invoices. *CIM*, however, is distinguishable on two grounds. First, there is no discussion of the consideration offered by the insurers in that instance. Indeed, given the block quote from *Erskine v. Chevrolet Motors Co.*, 185 N.C. 479, 117 S.E. 706 (1923), the decision suggests that the insurers promised something that they were not otherwise obligated to do but became obligated upon Cascade performing the replacement services. *CIM*, 660 S.E.2d at 910 *quoting Erskine* (emphasis added) ("where one makes a promise, *conditioned upon the*

doing of an act of another....''). In the present case, the promise made by Grange is not conditioned upon 20/20's action but rather is conditioned upon the breakage of the glass and fulfillment of the insurance policy terms.

Second, there is no discussion of any assignments of the insurance proceeds or the corresponding contractual obligations owed by the insurers. The issues presented here by 20/20 were never addressed by the North Carolina Court of Appeals. As a result, that case is distinguishable the present case.

The other two cases cited by the trial court – and relied on by this Court in *Southern Glass* – are less applicable than even *CIM*. For example, in *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 115 P.3d 751 (2005), the Idaho Supreme Court confronted a question of interpretation of Idaho Farm Bureau's insurance policy: "The issues presented require an interpretation of the insurance policy language and a determination of whether Farm Bureau met its obligations under the insurance contract." 115 P.3d at 752. The entire case involved the meaning of Farm Bureau's unique policy language; it had absolutely nothing to do with unilateral contracts. "After looking at the plain meaning of the words of the insurance contract at issue, the district court was correct in determining the policy is not ambiguous and that Farm Bureau has fully performed its obligations under the policy." 115 P.3d at 755. That is clearly not the situation here. As a result, the Idaho case has no application to these facts at all.

Similarly, *Cascade Auto Glass v. Progressive Cas. Ins.*, 135 Wn. App. 760, 145 P.3d 1253 (Wash. App. 2006), is inapplicable because it involved facts that are radically different from the current case. There, the parties had entered into a written pricing contract that was terminable at will. 145 P.3d at 1255. In its analysis of the issue on appeal, the court noted that terminable at will contracts "may be unilaterally modified." 145 P.3d at 1257. There was also no indication that the glass company objected to the alteration in the pricing terms and, in fact, the evidence was that such agreements were frequently modified. *Id.* Given those considerations, the Washington Court concluded: "Progressive can also modify its pricing terms unilaterally because the pricing agreement is terminable-at-will. Accordingly, in paying the revised amounts, Progressive has complied with its obligations under the pricing agreement." 145 P.3d at 1258. Here, there was no prior terminable at will pricing agreement that may be unilaterally modified. Accordingly, both the reasoning and the outcome of the case are meaningless here.

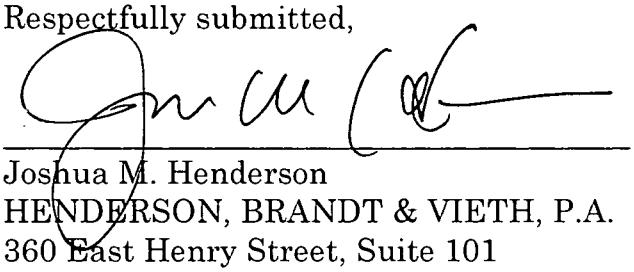
CONCLUSION

The undisputed facts show that neither side intended to be bound by the pricing terms set forth in Grange's claim confirmation/notification documents. The documents themselves show that the pricing was not binding but was subject to alteration, 20/20 did not follow Grange's instructions on either pricing or billing procedures and Grange then paid 20/20 more than the offered amounts. Beyond

the intent to be bound, there was no consideration given by Grange beyond what it was legally obligated to pay under the policy.

For all of the reasons stated, 20/20 Auto Glass respectfully requests that the judgment of the trial court be reversed and the matter remanded.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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

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