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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5021, S.C. Ct. Ap. filed August 15, 2012

Southern Glass & Plastics Company, Inc.,

Petitioner,

v.

Kemper, A Unitrin Business,

Respondent,

APPENDIX

Robert L. Jackson, Esquire
Jackson & Jackson
Post Office Box 7065
Columbia, South Carolina 29202
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Attorney for Petitioner

Other Counsel of Record:

Ashley B. Stratton
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Attorney for Respondent

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-40-7516

Southern Glass & Plastics Company, Inc.,

Appellant,

v.

Kemper, A Unitrin Business,

Respondent,

RECORD ON APPEAL

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Jackson & Jackson
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Columbia, South Carolina 29202
Attorney for Appellant

Ashley B. Stratton
Post Office Box 6648
Columbia, South Carolina 29260
Attorney for Defendant

Columbia, SC

July 7, 2011

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Civil Action No.: 2009-CP-40-7516

Southern Glass & Plastics Company, Inc.,

Plaintiff,

vs.

Kemper, A Unitrin Business.

Defendant.

**ORDER GRANTING SUMMARY
JUDGMENT TO DEFENDANT**

RICHLAND COUNTY
FILED
2010 AUG 24 PM 2:32
JEANETTE W. McCOY
Clerk, S.C.

This matter came before me on July 1, 2010, by motion of Defendant Kemper, A Unitrin Business (hereinafter "Defendant"). Present at the hearing were Robert L. Jackson Esquire, counsel for Plaintiff, Southern Glass & Plastics Company, Inc. (hereinafter "Plaintiff"), as well as Ashley B. Stratton, Esquire, representing Defendant. Defendant contends in its motion that Plaintiff entered into a contract with Defendant's third party administrator as an assignee of its customers' insurance claims to perform glass work for the customer at Defendant's stated rates. After hearing able arguments of counsel, reviewing the pleadings and submissions of the parties, the Court has concluded that Defendant's Motion for Summary Judgment should be granted.

FACTUAL AND PROCEDURAL BACKGROUND

In the course of its automobile glass repair and replacement business, Plaintiff performed automobile glass replacement services for twelve insureds of Defendant. For each replacement performed, Plaintiff received from the insured an assignment of any insurance proceeds owed to the insured under his or her automobile insurance policy with Defendant. Pursuant to these assignments, Plaintiff submitted invoices to Defendant which purportedly were not paid in full.

Plaintiff alleges the policy issued by Defendant to its insureds obligates Defendant to pay the full amount of Plaintiff's invoice and Defendant's failure to do so is a breach of the policy terms.

Plaintiff's breach of contract claim was originally filed in magistrate's court. However, Defendant's answer and counterclaim seeking a declaratory judgment brought the claim within the jurisdiction of this Court. Specifically, Defendant seeks a declaration that it did not breach the terms of the insurance policy which required it to pay the "[a]mount necessary to repair or replace the property with other property of like kind and quality." Defendant also seeks a declaration that Plaintiff is bound to the rates it accepted when it entered binding contracts with Defendant's third-party administrator upon performance of glass repair or replacement services for Defendant's insureds.

ANALYSIS

Plaintiff entered into a contract with Defendant's third party administrator as an assignee of its customers' insurance claims to perform glass work for the customers at Defendant's stated rates. The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). A valid offer "identifies the bargained for exchange and creates a power of acceptance in the offeree." Id. (citing Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct.App. 1993)). A contract can occur when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance. Id. (citing International Shoe Co. v. Herndon, 135 S.C. 138, 133 S.E. 202 (1926)).

The existence of a binding enforceable contract is evidenced by transcripts of telephone conversations between Plaintiff's representative (a shop employee), Plaintiff's customer (Defendant's insureds), and Defendant's third party administrator (Safelite Solutions) wherein

the glass claim was reported and express offer was made by Safelite on behalf of Defendant. For instance, one transcript reads:

Defendant's third party administrator: ... I just need to know if you accept the job at the following pricing ... NAGS list minus thirty-seven percent, labor is \$41.00 hourly and \$15.00 per kit.

Plaintiff's representative: We accept the job.

Defendant's third party administrator: Thank you. Your acceptance of the job also indicates that you have accepted these rates and these prices do not include tax or the cost of molding....

Plaintiff's representative: Yes, ma'am.

Thus, the telephone transcript evidences not only an express offer on behalf of Defendant, but also an express acceptance on behalf of Plaintiff.

The offer was further confirmed in a fax sent by Defendant's third party administrator to Plaintiff prior to the work being performed on the customer's vehicle. This fax, characterized by Defendant as a "work order", confirmed the rates agreed to during the telephone conversation and contained a maximum price the Defendant would pay for the glass work:

W/S LIST: - 37.0% LABR: \$41.00 PER HOUR
C/T LIST: - 37.0% LABR: \$41.00 PER HOUR
KIT: \$15.00 2KIT: \$30.00 H/M KIT: \$25.00 H/M 2KIT: \$45.00
KEMPER has determined the maximum amount of such work is: \$453.81 less any applicable deductible amount

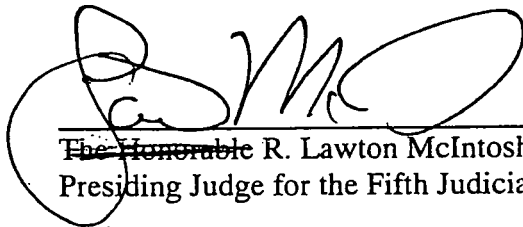
The work order also stated: "Performance of services constitutes acceptance of the above price and billing instructions." After Plaintiff verbally agreed to Defendant's rates over the telephone and received the work order confirming the rates, it performed the glass work without objection or further communication with Defendant's third party administrator. Thereafter, Plaintiff further confirmed its acceptance of Defendant's rates when it accepted and negotiated checks in the amount specified by the work order.

In reaching this conclusion, I have reviewed and found persuasive the case of CIM Insurance Corporation v. Cascade Auto Glass, Inc., 660 S.E.2d 907 (N.C. App. 2008), to the extent it binds an auto glass repair shop to the contract it enters to perform the glass work at the rates provided by Safelite. Based on virtually identical facts and claims, the North Carolina Court of Appeals held: "Because [the glass shop] performed the requested repairs or replacements, it accepted the terms of [the insurance company's] offers, forming valid unilateral contracts at [the insurance company's] stated prices." CIM, 660 S.E.2d at 910.

As in CIM, Plaintiff accepted Defendant's rates and entered into binding contracts when it performed services for Defendant's insureds. Plaintiff verbally agreed to Defendant's rates before it performed the work and accepted Defendant's rates by performance and acceptance of payment. Under the undisputed facts of the case, the parties' representatives discussed and agreed to pricing and otherwise entered a valid enforceable contract. It should also be noted that the authority of the parties' respective representatives to bind their "employers" was not an issue before the Court.

For the reasons stated above, it is therefore **ORDERED** the Defendant's motion for summary judgment is **GRANTED**.

AND IT IS SO ORDERED.



The Honorable R. Lawton McIntosh
Presiding Judge for the Fifth Judicial Circuit

August 13
~~July~~ 2010
Columbia, South Carolina
Anderson

STATE OF SOUTH CAROLINA

COUNTY OF ~~ANDERSON~~ ^{RICHLAND}

JUDGMENT IN A CIVIL CASE

CASE NO. : 2009-CP-40-7516

IN THE COURT OF COMMON PLEAS

Southern Glass & Plastics Co., Inc. v. Kemper, A Unitrin Business

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

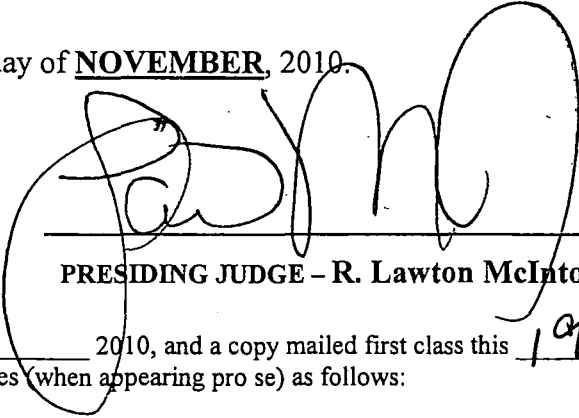
☐ See attached order;

☒ Statement of Judgment by the Court:

Plaintiff Southern Glass & Plastics Co., Inc.'s motion to alter or amend is DENIED.

Dated at ANDERSON, South Carolina, this 10th day of NOVEMBER, 2010.

Court Reporter: _____


PRESIDING JUDGE - R. Lawton McIntosh

This judgment was entered on the 10th day of NOV, 2010, and a copy mailed first class this 19 day of NOV, 2010 to attorneys of record or to parties (when appearing pro se) as follows:

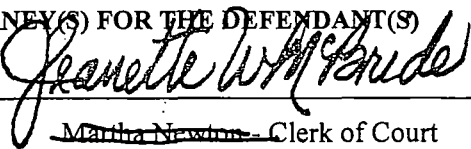
ROBERT L. JACKSON

ATTORNEY(S) FOR THE PLAINTIFF(S)

SCRPC APP-24/FORM 4 (Rev. 6/02)

ASHLEY STRATTON

ATTORNEY(S) FOR THE DEFENDANT(S)


Martha Newton Clerk of Court

Rec'd 11/24/10

RICHLAND COUNTY
FILED
2010 NOV 19 PM 1:46
JEANETTE W. McBRIDE
C.C.P. & S.

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CIVIL CASE NUMBER

IN THE MAGISTRATE'S COURT

COMPLAINT

Southern Glass + Plastics Co., Inc.
1819 Taylor St
Columbia, SC 29201

PLAINTIFF(S)

Vs

Kemper Casualty Insurance Company
One Kemper Dr. Licensing, F-3
Long Grove, IL 60049-0001

DEFENDANT(S)

I, Alan Epley, President of Southern Glass + Plastics Co., Inc. the plaintiff(s) in this civil action do make the following claims:

1. I believe that the defendant(s),

Kemper Casualty Insurance Company
SC Department of Insurance
Company code # 100-509

is/are a resident(s) of Richland County, or this Complaint is properly filed in Richland County.

2. I make this complaint on the following:

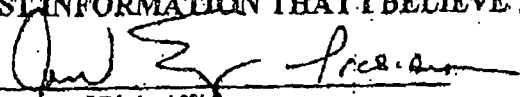
See attached sheet for the factual allegation of
the Complaint

(Attach supplement if necessary)

3. I believe, because of the above information, that I am entitled to and do request a judgment for
\$ 2301.98 and/or relief as below requested:

including any costs resulting in this action.

I STATE UNDER PENALTY OF PERJURY THAT THE ABOVE STATED FACTS ARE TRUE EXCEPT THOSE BASED ON MY BEST INFORMATION THAT I BELIEVE TO BE TRUE.


Signature of Plaintiff/Attorney

Factual allegations for complaint

Southern Glass performed auto glass replacement services for 12 insureds of defendant Kemper Casualty Insurance Company. For each of the replacements performed, Southern Glass received from its customer an assignment of the insurance proceeds owed to the customer by the defendant. In each instance, Southern Glass submitted its invoices directly to the defendant or defendant's third party administrator. Consistent with the assignment, defendant or its third party administrator issued a payment directly to Southern Glass. Defendant, however, failed to pay Southern Glass's invoice in full. Defendant's insurance policy obligates it to pay the full amount of Southern Glass's invoice and therefore defendant has breached the terms of its insurance policy and is indebted to Southern Glass in the amount of \$2,301.98.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Southern Glass & Plastics Company, Inc.,

Plaintiff,

vs.

Kemper Casualty Insurance Company,

Defendant.

IN THE MAGISTRATE'S COURT

Civil Action No.: 2009CV401102356

**AMENDED ANSWER AND
COUNTERCLAIM**

TO: ALAN EPLEY, PRESIDENT OF THE PLAINTIFF ABOVE NAMED:

The Defendant, Unitrin Auto and Home Insurance Company (incorrectly designated as Kemper Casualty Insurance Company), answering the Plaintiff's Complaint herein, would respectfully show unto the Court that:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted.

2. Upon information and belief, the Defendant admits that the Plaintiff performed automobile glass replacement services for twelve insureds of the Defendant.

3. In response to the Plaintiff's Complaint, the Defendant states that it lacks sufficient information to form a belief as to the truth or falsity of the Plaintiff's receipt of assignments from its customers of the insurance proceeds owed to the customer by the Defendant and therefore denies the same and demands strict proof thereof.

4. In response to the Plaintiff's Complaint, the Defendant states that it lacks sufficient information to form a belief as to the truth or falsity of the Plaintiff's submittal of

invoices directly to the Defendant or to the Defendant's third party administrator and therefore denies the same and demands strict proof thereof.

5. In response to the Plaintiff's Complaint, the Defendant states that it lacks sufficient information to form a belief as to the truth or falsity of the Plaintiff's receipt of payment directly from the Defendant consistent with the assignment and therefore denies the same and demands strict proof thereof.

6. In response to the Plaintiff's Complaint, the Defendant admits only that it paid the amount due on the invoices that was specified by the insurance contract and agreed upon before the Plaintiff began work on the insureds' vehicles. However, the Defendant denies the remaining allegations that it did not pay the full amount of the Plaintiff's invoices.

7. In response to the Plaintiff's Complaint, the Defendant denies that its insurance policy obligates it to pay the full amount of the Plaintiff's invoices.

8. In response to the Plaintiff's Complaint, the Defendant denies it breached the terms of the insurance policy.

9. In response to the Plaintiff's Complaint, the Defendant denies it is indebted to the Plaintiff in the amount of \$2,301.98.

FOR A SECOND DEFENSE

10. The Defendant would show upon information and belief, that the Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, and therefore, the Plaintiff's Complaint should be dismissed with costs.

FOR A THIRD DEFENSE

11. The Defendant would show upon information and belief, that the Plaintiff has

failed to properly serve the Defendant and that this matter should be dismissed for insufficiency of process and insufficiency of service of process in accordance with Rule 12(b)(4) and Rule 12(b)(5) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE

12. The Plaintiff is estopped from asserting a claim for insurance proceeds from the Defendant because it was provided with fair notice of and accepted the fair and reasonable rate schedule and payment made by the Defendant when it performed repair work for the insureds.

FOR A FIFTH DEFENSE

13. The Defendant would show upon information and belief, that the Plaintiff accepted payment from the Defendant for the services rendered and cannot now claim entitlement to further payment. Therefore, the Defendant pleads Accord and Satisfaction as a complete defense to the Plaintiff's Claim.

**FURTHER ANSWERING THE COMPLAINT AND AS A COUNTERCLAIM
AGAINST THE PLAINTIFF**

The Defendant seeks declaratory relief to determine the rights of the parties. Defendant, complaining of the Plaintiff above-captioned, would respectfully allege and show as follows:

JURISDICTION

14. The Defendant is an insurance company organized and existing under the laws of another state but authorized to transact business and write insurance policies in the State of South Carolina.

15. Upon information and belief, the Plaintiff is a corporation organized and existing under the laws of South Carolina with its principal place of business in Columbia, South Carolina.

16. This action is brought under the provisions of the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 et seq. and Rule 57, SCRCP; there is a real and justiciable controversy between the parties, and by these proceedings the Defendant asks the Court to inquire into and declare the rights and obligations of the parties hereto arising out of the facts set forth below.

17. The amount in controversy exceeds Seven Thousand Five Hundred and No/100 (\$7,500.00) Dollars, exclusive of interests and costs, and, therefore, this Court should transfer the case to the Richland County Court of Common Pleas pursuant to S.C. Code Ann. § 22-3-30.

FACTUAL ALLEGATIONS

14. As the alleged assignee of the insurance benefits owed to its customers by the Defendant, the Plaintiff is bound by the terms of the insurance policy issued by the Defendant to the insureds.

15. The insurance policy controlling the Plaintiff's claim states:

LIMIT OF LIABILITY

A. Our limit of liability for loss will be the lesser of the:

1. Actual cash value of the stolen or damaged property; or
2. Amount necessary to repair or replace the property with other property of like kind and quality.

(Policy p. 12 of 15.)

16. The Defendant paid the amount necessary to repair or replace the damaged glass for each invoice submitted by the Plaintiff.

17. Before performing the glass repair and replacement services on the insureds' vehicles, the Plaintiff agreed to the amount Defendant would pay pursuant to the policy when it discussed each claim on the telephone with the Defendant's third-party claims administrator,

Safelite Solutions.

18. The Plaintiff also agreed to the price that was quoted in the work order sent by Safelite Solutions to the Plaintiff before glass repair and replacement services were performed.

19. The work order sent to the Plaintiff by the Defendant through Safelite Solutions stated: "Performance of services irrevocably constitutes acceptance of the above price and billing instructions."

FOR A FIRST DECLARATION

20. The Defendant repeats, re-alleges, and incorporates paragraphs 1 through 19 as if fully set forth herein verbatim.

21. The limit of liability for glass claims is clearly set forth in the policy.

22. The Defendant paid its limit of liability pursuant to the policy.

23. Therefore, the Defendant is entitled to a declaration that the above-referenced policy was not breached and that no further sums are due to the Plaintiff under the terms of the policy.

FOR A SECOND DECLARATION

24. The Defendant repeats, re-alleges, and incorporates paragraphs 1 through 23 as if fully set forth herein verbatim.

25. The Plaintiff agreed to amounts payable under the policy through verbal acceptance over the phone and performance of services as stated in the work order.

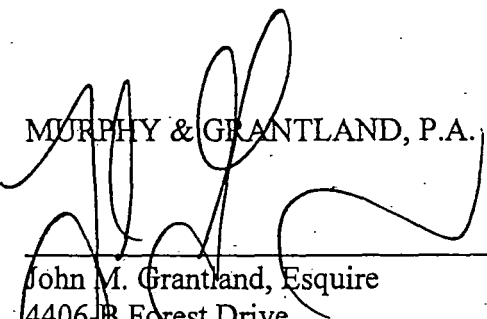
26. When the Plaintiff accepted the amounts payable under the policy, it entered a unilateral contract with the Defendant for payment at the Defendant's stated prices.

27. Therefore, the Defendant is entitled to a declaration that the Plaintiff has not been underpaid and is not entitled to any further sums because it is contractually bound to the Defendant's stated prices.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendant denies the Plaintiff is entitled to any relief whatsoever and prays that the Plaintiff's Complaint be dismissed with prejudice and for such other and further relief as the Court deems just and proper. Plaintiff also requests that the Court inquire into these matters and declare that the policy of insurance was not breached, that the Plaintiff is contractually bound to the prices it accepted, that the Defendant therefore does not owe Plaintiff any further sum of money, and such other and further relief as the court may deem just and proper including costs and fees.

This the 23rd day of September, 2009, in Columbia, South Carolina.

MURPHY & GRANTLAND, P.A.



John M. Grantland, Esquire
4406-B Forest Drive
Post Office Box 6648
Columbia, SC 29260
Tel.: (803) 782-4100; Fax: (803) 782-4140
Attorney for Defendant

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Civil Action No.: 2009-CP-40-7516

Southern Glass & Plastics Company, Inc.,

Plaintiff,

vs.

Kemper, A Unitrin Business.

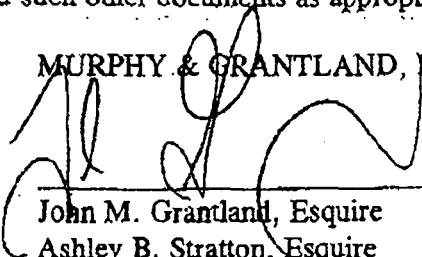
Defendant.

**DEFENDANT'S NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT****TO: ALAN EPLEY, PRESIDENT OF THE PLAINTIFF ABOVE NAMED:**

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant, Kemper, A Unitrin Business, will move before the presiding judge of the Richland County Court of Common Pleas at the Richland County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may conveniently be heard, for an Order granting summary judgment in favor of the Kemper, A Unitrin Business, on grounds that there is no genuine issue as to any material fact.

This Motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and will be supplemented and supported by such affidavits, depositions, discovery responses, memoranda of law, and such other documents as appropriate.

MURPHY & GRANTLAND, P.A.


John M. Grantland, Esquire

Ashley B. Stratton, Esquire

4406-B Forest Drive

Post Office Box 6648

Columbia, SC 29260

Tel.: (803) 782-4100; Fax: (803) 782-4140

Attorney for Defendant

Columbia, South Carolina
February 3, 2010

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Southern Glass & Plastics Co. Inc.,)
Plaintiff,)
vs.)
Kemper, A Unitrin Business.)
Defendant.)

IN THE COURT OF COMMON PLEAS

09-CP40-7516

NOTICE OF MOTION AND
MOTION TO ALTER OR AMEND
RULES 59(e) and 52(b) SCRC

2010 SEP -7 PM 3:18
JENNIFER W. McBRIDE
C.C.P. & G.S.

FILED

TO THE DEFENDANT AND ITS ATTORNEY, ASHLEY B. STRATTON,

ESQUIRE:

YOU WILL PLEASE TAKE NOTICE that the undersigned will motion the court on the tenth day after service hereof, or as soon thereafter as the matter can be heard, for an Order to alter or amend its Order Granting Summary Judgement to Defendant, dated August 13, 2010, filed August 24, 2010, a copy received by Plaintiff's attorney on August 27, 2010.

The grounds for this motion are as follows:

1. To obtain summary judgment, the moving party must show that no genuine issue exists as to any material fact and that the moving party is entitled to summary judgment as a matter of law. In determining whether any triable issues in fact exists, all inferences from the facts must be viewed in the light most favorable to the party opposing the summary judgment motion. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted." *Hamilton v. Miller*, 301 SC 45,47,389 SE 2d 652, 653, (1990).

2. Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co. Inc.*, 38 SC 326, 673 SE 2d 801 (2009); *Zurich American Ins. Co. v. Tolbert*, 387 SC 280, 692 SE 2d 523 (2010); *Murr v. Nationwide Mutual Ins. Co.*, (Ct. App. Opinion No 4709, Heard April 13, 2010 - Filed July 7, 2010).

3. The issue between the parties is "Whether or not the parties formed a valid unilateral contract, simply because the Plaintiff repaired or replaced auto glass "after" being informed by Defendant's third-party administrator, what it would pay for said work."

4. The issue between the parties and the court is "Whether there is a genuine issue as to any material fact which would prohibit the court from granting a motion for summary judgment," and is there a scintilla of evidence to support a genuine issue as to any material fact?

5. The trial judge's entire order is based upon "Whether or not the parties formed a valid unilateral contract, simply because the Plaintiff repaired or replaced auto glass "after" being informed by Defendant's third-party administrator what it would pay for said work." In reaching his decision the trial judge found persuasive the case of *CIM Insurance Corporation v. Cascade Auto Glass, Inc.*, 660 SE 2d 907 (NC App. 2008).

6. Based upon the identical scenario as the facts in this case and the facts in CIM, the Connecticut Supreme Court said that the companies performance of glass repairs, without more, was not acceptance of price contained in letters sent to companies by insurer. *Auto Glass Express, Inc. v. Hanover Insurance Company*, 292 Conn. 218, 975

A. 2d 1255 (2009).

7. If the appellate courts of two different states can reach different conclusions on the identical scenario of facts, it is apparent that there is a genuine issue as to a material fact.

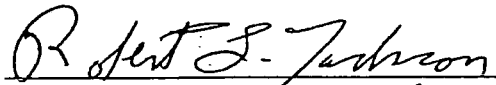
8. In the Affidavit of Alan S. Epley, the President and owner of Plaintiff and in the Plaintiff's memorandum provided to the court, the Plaintiff disputes the Defendant's claim of a valid unilateral contract, which is more than a scintilla of evidence needed to defeat a motion for summary judgment.

9. In the factual and procedural background the trial judge states that... "Plaintiff performed automobile glass replacement services for twelve insureds of Defendant." Yet his decision granting the motion for summary judgment was based only on one transcript of a telephone conversation between Plaintiff's representative (a shop employee), Plaintiff's customer (Defendant's insured and Defendant's third party administrator (Safelite Solutions)).¹ The trial judge then concludes that the "one telephone transcript" evidences not only an express offer on behalf of Defendant (to the other eleven insureds), but also an express acceptance on behalf of Plaintiff." (for the other eleven insureds).

¹Plaintiff's counsel objected to introduction of the transcript into evidence on the grounds that it had not been presented to counsel prior to the hearing. It was a surprise to counsel and prejudiced Plaintiff's case. Objection was overruled

10. The trial judge states at the end of his Order "It should also be noted that the authority of the parties respective representatives to bind their "employers" was not an issue before the Court." There are several reasons this issue was not before the Court. The first reason is that neither Plaintiff nor Plaintiff's counsel were aware that it needed to be an issue until Defendant's counsel introduced the transcript at the motion's hearing. The second reason is that this issue goes to the merits of Defendant's case and Plaintiff's counsel prepared for a Summary Judgment Motion's hearing, not a merits hearing.

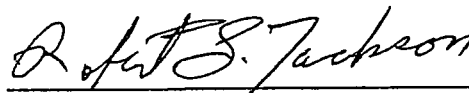
Respectfully Submitted,


Robert L. Jackson
Attorney for Plaintiff

Columbia, SC
September 7, 2010

CERTIFICATE

The undersigned counsel for Plaintiff certifies that consultation with opposing counsel in an attempt to resolve the matter contained in this motion would serve no useful purpose.


Robert L. Jackson

FILED
2010 SEP -7 PM 3:58
JEANETTE W. McBRIDE
C.C.P. & G.S.

COPY

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

09CP40-7516

Southern Glass & Plastics Co. Inc.,)

Plaintiff,)

vs.)

Kemper, A Unitrin Business.)

Defendant.)

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

2010 JAN 29 AM 10:28
CLERK W. McBRIDE
C.P. & G.S.

RICHLAND COUNTY
FILED

Plaintiff, Southern Glass & Plastics Co., Inc. (hereinafter Southern Glass)

submits this memorandum in opposition to Kemper's motion for summary judgment.

FACTS

In the course of its automobile glass repair and replacement business, Southern Glass. Southern Glass replaced glass in the automobiles of twelve of Kemper's insureds. For each replacement performed, Southern Glass received from the insured an assignment of the insurance proceeds owed to the insured pursuant to the terms of the insureds automobile insurance policy with Kemper. Pursuant to these assignments, Southern Glass submitted invoices to Kemper. These invoices were not paid in full. Southern Glass filed actions in Magistrates Court for the balance of the invoices. Kemper's failure to pay the full invoice pursuant to the terms of the insurance contract is a breach of contract.

Southern Glass maintains, and Kemper admits in its memorandum, that the policy requires Kemper to pay the "[a]mount necessary to repair or replace the property with other property of like kind and quality." Southern Glass's invoices reflect the amount necessary to repair of replace the property with other property of like kind and quality.

ARGUMENTS

Kemper has set forth two arguments in support of its motion for Summary Judgment. Southern Glass will address Kemper's second argument first, because the position adopted by this court will determine the outcome of argument number one.

II) WHEN PLAINTIFF PERFORMED SERVICE AND ACCEPTED PAYMENT FROM KEMPER, IT DID NOT ENTER INTO A UNILATERAL CONTRACT WITH KEMPER AT KEMPER'S STATED RATES.

The issue presented is a novel issue for The State of South Carolina and Kemper urges this Court to adopt the position of North Carolina in its recent decision in CIM Insurance Corporation v. Cascade Auto Glass, Inc., 660 SE 2d 907 (NC App 2008.) In support of its argument, Kemper cites two cases; one from Idaho, Cascade Auto Glass, Inc. v. Idaho Farm Bureau Insurance Co., 115 P 3d 751 (Idaho 2005), and one from Washington, Cascade Auto Glass, Inc. v. Progressive Casualty Insurance Company, 145 P 3d 1253 (Wash. Ct. App. 2006) review denied 166 P 3d 1217 (Wash. 2007).

The decision of the Idaho Supreme Court in Idaho Farm Bureau does not apply at all to this case. The Idaho court based its decision on specific language in the insurance policy that is materially and conclusively different from the language in Kemper's policies.

The limit of liability for automobile glass repair or replacement in Idaho Farm Bureau's policies read as follows:

Our limit of liability under [the comprehensive coverage in the policy governing automobile glass... is...[t]he cost of repair or replacement using parts of like kind and quality...**The cost of repair or replacement is based on the cost of repair agreed upon by us** or and estimate written based upon the prevailing competitive price. The prevailing competitive price

means labor rates, parts, and material prices charged by a substantial number of repair facilities in the area where the insured vehicle is to be repaired. Id at 752 (emphasis added).

Based upon the policy language, the court held that the insurer had retained the power to unilaterally set the price it would pay for auto glass repair or replacement. Id at 754. The court said that “the policy is clear in stating that Farm Bureau will pay the amount agreed to by Farm Bureau.” Id at 755.

The court recognized that this was an extreme conclusion; nevertheless it said the conclusion was justified by extreme policy language. Cascade argued that the court’s interpretation of the policy meant that Farm Bureau could set prices so low as to render its coverage entirely illusory, so low that no glass shop would accept such a payment in return for its services. The court agreed: “While it is true the terms of the policy could conceivably be read to allow Farm Bureau to agree to pay one dollar per glass claim, there are other possible causes of action or challenges which could be asserted in that instance.” The court did not elaborate on what those “causes of action or challenges” might be.

In contrast, Kemper’s policy reads as follows:

Our limit of liability for loss will be the lesser of the

1. Actual cash value of the stolen or damaged property; or
2. Amount necessary to repair or replace the property with other property of like kind and quality.

This language is not even close to the language in the Idaho Farm Bureau policy, “agreed upon by us.” The Idaho Farm Bureau case was decided on policy language and not on some “TRICK” to create a unilateral contract.

Just as the Idaho Farm Bureau case does not avail Kemper, neither does the

Progressive case. The facts of Progressive are irreconcilably different. This case's single most important fact, which undergirds the entire decision, is that Cascade and Progressive had previously entered into an express, written contract establishing the prices Progressive would pay for the services provided by Cascade. Progressive, 145 P 3d at 1254-55. In relevant part, the contract provided that "[t]his pricing agreement is solely for the purpose of insuring a fair price for work completed by [Cascade, which]... further agrees that each invoice submitted to Progressive Insurance will be billed at the rates and discounts listed above." Id at 1255. The contract had no set duration, but the parties agreed that it would be terminable at will. The dispute arose when Progressive entered into an agreement with Safelite to administer its glass claims. Safelite proceeded to change the pricing standards with Cascade and informed Cascade of the changes in letters which professed to supersede the terms of the prior agreement. After continuing to make repairs to vehicles insured by Progressive and being paid at the lower rates, Cascade sued Progressive for breach of the original pricing agreement.

The key difference between Progressive and this case is that the court in Progressive analyzed the pricing letters as modifications to the existing written contract rather than entirely new contracts.¹

Because the original contract was terminable at will, Washington law provided

¹Although in parts of the opinion the court indicates that it considers the revised pricing letters to constitute new contracts, and in other parts treats them as modifications, the overall logic of the opinion mandates a conclusion that they are modifications, rather than new contracts.

that terminable at will contracts were unilaterally modifiable. Id at 1257-58. ("Progressive can...modify its pricing terms unilaterally because the pricing agreement is terminable -at-will.") In this case, Kemper has not alleged that Southern Glass had a pre-existing contract, terminable-at-will regarding pricing with Kemper.

The Progressive opinion is very clear that the original written contract between the parties controlled the controversy for the Washington Court. "[B]oth parties clearly intended the pricing agreement to be binding, and courts construe contracts giving great weight to the parties intent...Here, it is evident that both parties intended the agreed terms to satisfy all the obligations between them..." In the case presently before this court, where there is no pre-existing contract for pricing between the parties, it would be extremely unreasonable to find that letters sent by Safelite to Southern Glass manifest clear intent on the part of Southern Glass to be binding. Therefore, this Court should disregard both the Progressive and Idaho Farm Bureau cases as controlling factors in this case.

B. Ambiguity

Kemper correctly states the law in South Carolina when it says "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Schulmeyer v. State Farm Fire and Cas. Co., 353 SC 491, 579 SE 2d 132 (2003). Kemper assumes that when it sends out its pricing letters to the various glass shops informing them of what it will pay that this language is clear and unambiguous. However, an examination of one of the pricing letters received by Southern Glass reveals otherwise. EXHIBIT 2. What the letter says is "Invoices from you that are accurate and not exceeding this pricing structure will be

paid promptly as submitted.² The letters themselves do not condition the payment of claims on their being full and final settlement and are silent about bills that are more than the allowable claims. The letters, therefore, do not evidence an intention on the part of Kemper not to pay a greater amount, but rather an intention not to pay a greater amount promptly. Auto Glass Express, Inc. v. Hanover Ins. Co., 98 Conn App at 794 n6, 912 A 2d 51-3.

Southern Glass maintains that if there is a unilateral contract, which it specifically denies, it is ambiguous, indefinite and uncertain in its terms and should be construed against Kemper and in favor of Southern Glass.

C. Acceptance of Terms

Kemper maintains that when Southern Glass performs the work, Southern Glass has consented to accept what Kemper says it will pay. The creation of a contract requires acceptance of an offer. Acceptance may be express, or it may be demonstrated by acts or conduct indicating consent. Wade v. Brooks, 306 SC 553, 413 SE 2d 333 (SC App 1992). If an agreement between parties is manifested by words, the contract is said to be express, while if it is manifested by conduct it is said to be implied, but in either case, the parties must manifest a mutual intent to be bound; without actual agreement of the parties, there is no contract. Stanley Smith & Sons v. Limestone College, 283 SC 430, 322 SE 2d 474 (SC App 1984). If one of the parties has not agreed to all essential terms to alleged implied contract, then prerequisite to formation of an implied contract is lacking. Stanley Smith, *supra*

²This pricing letter is dated January 24, 2006, but they all contain virtually the same language.

In this case, Southern Glass rejected Kemper's pricing letters in at least three different ways. First, after accepting the assignment of the insured's policy proceeds and performing the requested work, Southern Glass billed Kemper in amounts different from those specified in the pricing letters, thus manifesting an intent to perform according to the assignments, not the pricing letters. In other words, Southern Glass did not accept the offers by performance, which is required for the creation of a unilateral contract. Second, Southern Glass has informed Safelite and Kemper that it does not accept its pricing letters and that it is not forming a unilateral contract with the insurance company. EXHIBIT 1 §§5&6. Third, after not being paid the amount invoiced, Southern Glass filed an action in Magistrates Court for the balance of its invoices. Under the circumstances, it is not clear what more Southern Glass could have done in order to manifest an intention not to accept Kemper's offers.

Professor Williston addressed a situation similar to the case at bar:

[W]here an act is requested by the offeror and performed by the offeree, it may be shown that the performance of the act was not done with an intent to indicate assent to the offer. Even though the offeree knows of the offer, he may, if he chooses, do the act requested and still refuse to accept the offer. Thus, if the offeror offers a reward for the finding of a watch, the finder may state that though he returns the watch, he does not accept the offer. And even if the offeree makes no express disclaimer, it is still true that the finding and return of the watch is an ambiguous act which may mean assent to the offer or merely that the finder is sufficiently honest to return the property without desiring a reward. If, in a particular case, it indicates assent to the offer, there is a contract; but it may be evidence, from all of the facts and circumstances surrounding the return of the watch, that the act did not mean assent to the offer, in which case there is no contract. Thus it may be said that when the offeree's outward manifestations are ambiguous or unclear, particularly when they take the form of conduct, an inquiry into subjective intent, as well as into all of the other circumstances surrounding

the outward manifestation, is appropriate.³

In this case, Southern Glass manifested its intent not to accept by invoicing on terms other than those of the pricing letters and by expressly informing Kemper of its rejection of Kemper's pricing terms.

D. Lack of Consideration

In South Carolina, the necessary elements of a contract are an offer, acceptance, and valuable consideration. Trident Const. Co., Inc. v. Austin Co., 272 F Supp. 2d 566 (D.S.C. 2003), affirmed 93 Fed App 509. Although mutuality of obligation is not an essential element in unilateral contracts, a valuable consideration is necessary. International Shoe Co. v. Herndon, 135 SC 138, 133 SE 202 (1926).

Kemper's purported unilateral contracts lack consideration by operation of the pre-existing duty rule. The pre-existing duty rule provides that an agreement to do that which one is already legally bound to do is not sufficient consideration to support a contract. McLeod v. Sandy Island Corp., 265 SC 1, 216 SE 2d 746 (1975).

In this case, Kemper had a pre-existing duty, arising out of its insurance policies, to pay Southern Glass. Therefore, Kemper's promise in the pricing letters to pay Southern Glass for its work on the vehicles of Kemper's insureds cannot serve as consideration for a unilateral contract, because Kemper was already bound to pay Southern Glass as assignee for the work.

³Richard A. Lord, Williston on Contracts §6:4 (4th ed. 2007) (emphasis added). The Restatement of Contracts is in accord with this rule: "Where an offer of a promise invites acceptance by performance...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." Restatement (Second) of Contracts § 53(3) (1981).

E. The Better Reasoned View

The scenario established by the facts in this case is the scenario across the country. It has been devised by Safelite, which is in the glass replacement business, to put all other glass replacement companies out of business and thus control the market. It hopes to accomplish its goal by interjecting itself as the agent for Kemper, USAA, CIM, and many other insurance companies, into a contractual relationship between the insured and the glass companies. In legal terms, this is interference with a contractual relationship, which is a cause of action for damages.

The North Carolina Court of Appeals and the Connecticut Supreme Court are the two highest state courts in the country to address the scenario presented by the facts in this case. The United States District Court for the District of Minnesota has addressed the issue, and its reasoning and conclusions are the same as the Connecticut Supreme Court. Alpine Glass, Inc. v. Illinois Farmers Insurance Company, et.al., ___ F Supp 2d ____ (2010).⁴

⁴The District Court, referring to the arbitration award appealed from by Farmers, and apparently adopted by the District Court, says "At the hearing, the Court denied Farmers motion for summary judgment on Count IV, and instead granted summary judgment to Alpine. For reasons explained at the hearing (and reflected in the transcript), the Court dismissed as near-frivolous Farmer's claim that, by sending an uninvited blast fax to auto glass shops throughout Minnesota announcing the prices that Farmers was willing to pay, Farmers somehow created a 'contract' with these auto-glass shops. Moreover, the Court ruled that Farmers could not raise as a defense in a no-fault arbitration proceeding between Farmers and one of the insureds (or Alpine standing in the shoes of that insured) the existence of an alleged pricing contract between Farmers and Alpine, when the insured was not a party to the alleged pricing contract, and Alpine was not a party to the insurance contract"

The North Carolina Court of Appeals has ruled in favor of the insurance companies, while the Connecticut Supreme Court and the Federal District Court for Minnesota have ruled in favor of the glass companies.

In Auto Glass Express, Inc. v. Hanover Insurance Company, 292 Conn 218, 975 A 2d 1266 automobile glass repair companies brought an action against automobile insurer to recover payment for short pays. Based upon the same scenario as this case, the trial court entered judgment in favor of insurer based on determination that unilateral contracts were formed between the parties. The Supreme Court of Connecticut reversed and held that companies performance of glass repairs, without more, was not acceptance of prices contained in letters sent to companies by insurer.

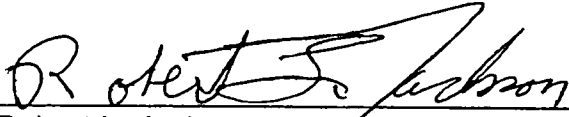
Argument 1) There is a genuine issue as to the material fact that Kemper did breach the terms of the insurance contract.

Based upon the arguments set forth above, Southern Glass maintains that there were no unilateral contracts formed between it and Kemper; Kemper is obligated to pay its invoice; and Kemper breached its contract by failing to pay the full invoice.

CONCLUSION

There are genuine issues of material facts; i.e. 1) did Southern Glass form a unilateral contract with Kemper each time it repaired glass for Kemper's insureds, 2) Did Kemper breach the terms of the insurance policy by not paying Southern Glass's full invoice? The Defendants motion for summary judgment should, therefore, be dismissed.

Respectfully Submitted


Robert L. Jackson
Attorney for Plaintiff

Columbia, SC
June 28, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2009-CP-40-7516

Southern Glass & Plastics Company, Inc.,

Plaintiff,

vs.

Kemper, A Unitrin Business.

Defendants.

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

Defendant Kemper, A Unitrin Business (hereinafter "Kemper") submits this memorandum in support of its motion for summary judgment.

FACTS

In the course of its automobile glass repair and replacement business, Plaintiff Southern Glass & Plastics Company, Inc. (hereinafter "Southern Glass"), performed automobile glass replacement services for twelve insureds of Kemper. For each replacement performed, Plaintiff received from the insured an assignment of any insurance proceeds owed to the insured under his or her automobile insurance policy with Kemper. Pursuant to these assignments, Plaintiff submitted invoices to Kemper which purportedly were not paid in full. Plaintiff alleges the policy issued by Kemper to its insureds obligates Kemper to pay the full amount of Plaintiff's invoice and Kemper's failure to do so is a breach of the policy terms.

Kemper seeks a declaration that it did not breach the terms of the insurance policy which required it to pay the "[a]mount necessary to repair or replace the property with other property of like kind and quality." (Policy p.12, attached as Exhibit 1.) Kemper also seeks a declaration that Plaintiff is bound to the rates it accepted when it entered unilateral contracts with Kemper upon

performance of glass repair or replacement services for Kemper's insureds.

ARGUMENT

I) There is no genuine issue as to any material fact that Kemper did not breach the terms of the insurance policy.

Under the plain and unambiguous terms of the policy, Plaintiff is not entitled to the full payment of its invoices by Kemper and, therefore, Kemper is entitled to summary judgment.

The policy of insurance issued by Kemper to its insureds and relied on by Plaintiff pursuant to Plaintiff's assignments states:

LIMIT OF LIABILITY

- A. Our limit of liability for loss will be the lesser of the:
1. Actual cash value of the stolen or damaged property; or
 2. Amount necessary to repair or replace the property with other property of like kind and quality.

(Policy p. 12).

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage. Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983). If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

Kemper's policy clearly obligates it to pay the amount necessary to repair the loss. The amount paid by Kemper to Plaintiff reflects the estimated amount approved of by Kemper to repair the insureds' automobile glass. Under the plain terms of the policy, Plaintiff is entitled to no more than what Kemper has agreed to pay and has no right to further payment. See Couch on

Insurance § 170.3 (“In the absence of contrary or modifying provisions in a statute, the liability of an insurer and the extent of the loss under a policy of automobile liability insurance must be determined, measured, and limited by the terms of the contract.”). As the assignee under the insureds’ policies, Plaintiff is bound to the terms of the insurance policy and is not entitled to the insurance proceeds claimed in this action.

II) When Plaintiff performed service and accepted payment from Kemper, it entered a unilateral contract with Kemper at Kemper’s stated rates.

Not only is Plaintiff bound by the clear and unambiguous terms of the policy, but it is also bound by the unilateral contract it entered into when it performed services on the insureds’ vehicles. The affidavit of Brad Boardman, overseer of the national glass program for automobile coverage for Kemper, shows that Plaintiff was notified of Kemper’s approved rates in three ways before the service was performed on the insureds’ vehicles. (Affidavit, attached as Exhibit 2.) First, Plaintiff received periodic rate notifications and revisions from Kemper based on Kemper’s evaluation of fair and reasonable rates for the area. (Affidavit ¶ 5.) These rates are based on industry data for glass claims and are reviewed several times each year. (Affidavit ¶ 4.) Kemper does not dictate what the glass shops should charge a customer, but merely informs the shops of what it is paying based on the insured’s policy and law. (Affidavit ¶ 5.)

Second, rates are shared with insureds and shops like the Plaintiff when the insured contacts Kemper, via Safelite, to report the glass claim. A customer service representative at Safelite contacts the shop of the claimant’s choice during the claim call to inform them of the rates before the shop begins working on the claimant’s vehicle. (Affidavit ¶ 6.) Third, after the shop agrees to or understands the rates Kemper will pay, the shop receives a referral sheet confirming the pre-approved cost of the repair or replacement and specifically stating:

“Performance of services irrevocably constitutes acceptance of the above price and billing

instructions.” (Affidavit ¶ 7; Referral Sheet, attached as Exhibit 3.) This referral sheet confirming the rates is sent to the shop before the shop begins working on the claimant’s vehicle. (Affidavit ¶ 7.) When the glass work has been completed, Kemper pays the claim based on the rate agreed upon by the shop before it began the work. (Affidavit ¶ 8.) Kemper’s fair and reasonable rates are accepted and agreed to by more than 98% of all glass shops up front. (Affidavit ¶ 8.)

There is no dispute that Kemper notified Plaintiff in advance of the rates it would pay for glass repair and replacement. Upon receiving such notice, Plaintiff had three options: it could simply do the work and accept the amount Kemper had stated it would pay; it could accept the insurance payment and collect the difference from the insured; or it could refuse to perform services for Kemper insureds unless the customer paid it for the work, leaving the customer to seek reimbursement from Kemper. See, e.g., Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 115 P.3d 751 (2005) (finding insurer fulfilled its obligations under the policy when it paid the amount it agreed in advance to pay to a glass shop who performed services for the insureds with unquestionable notice of the amount the insurer would pay).

Although South Carolina courts have not had occasion to address this situation, the North Carolina Court of Appeals has issued an opinion which is directly on point. In CIM Insurance Corporation v. Cascade Auto Glass, Inc., 660 S.E.2d 907 (N.C. App. 2008), an auto glass repair shop like Plaintiff brought the exact same claim as Plaintiff when it alleged that the insurance company had breached its policy by failing to pay the shop’s invoices in full. Like the instant case, the insurance company in CIM handled glass claims through its third-party administrator, Safelite Solutions. The insurance company, through Safelite, communicated the prices it was willing to pay the glass shop for services rendered to its insureds. As in this case, the prices were

communicated via telephone when the initial claims were made, via work order or confirmation fax after claims were made but before work was performed, and via eventual payment of invoices at the quoted rate rather than at the glass shop's rate. Id. at 910. The work order in CIM stated the exact same language as the work order sent from USAA via Safelite to Plaintiff: "Performance of services ... constitutes acceptance of the above price" Id. at 909. Finally, like Plaintiff, the glass shop in CIM accepted the stated price of the insurance company by performing the services and cashing the checks it received from the insurance company. See also Cascade Auto Glass Inc. v. Progressive Cas. Ins., 145 P.3d 1253 (Wash. Ct. App. 2006) ("Cascade created binding unilateral contracts each time it repaired or replaced auto glass for Progressive insureds.");

The North Carolina Court of Appeals affirmed summary judgment for the insurance company based on its compliance with the terms of its insurance contract, its payment to the glass shop in accordance with unilateral contracts the insurance company entered into with the glass shop, and the glass shop's actions in cashing checks sent to it by the insurance company which constituted an accord and satisfaction of any potential claim the glass shop might assert. Id. Citing the "fundamental concept of contract law that the offeror is the master of his offer," the court held that because the glass shop performed the requested repairs or replacements, it accepted the terms of the insurance company's offers, forming valid unilateral contracts at the insurance company's stated prices. Id. at 910 (citing MacEachern v. Rockwell Int. Corp., 254 S.E.2d 263 (N.C. App. 1979)). In both CIM and the instant case, the offer stated that acceptance was by performance. Because Plaintiff performed the requested repairs or replacements, it accepted the terms of Kemper's offers, forming valid unilateral contracts at Kemper's stated prices. Id.; see also Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987)

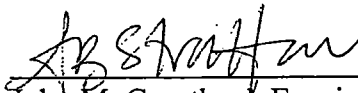
(holding that performance of a specific act constitutes acceptance of the offer when the offer so provides).

Based on the CIM opinion which addresses identical facts, Plaintiff accepted Kemper's rates and entered into unilateral contracts when it performed services for Kemper's insureds. Notably, Kemper paid more than the lowest fair and reasonable pricing available for the invoices Plaintiff now claims were short-paid. (Affidavit ¶ 9.) In fact, the amounts paid by Kemper to Plaintiff were all much higher than the rates Plaintiff routinely charges customers for the same glass on a walk-in or cash basis. (Affidavit ¶ 9.) Plaintiff agreed to Kemper's rates before it performed the work and accepted Kemper's rates when it accepted payment. Plaintiff cannot now escape the binding effect of the unilateral contracts it entered into with Kemper at Kemper's stated rates.

CONCLUSION

There is no genuine issue as to any material fact that Kemper did not breach the terms of its policy and that Plaintiff accepted Kemper's rates when it entered unilateral contracts upon performance of services for Kemper's insureds. Therefore, Kemper's motion for summary judgment should be granted.

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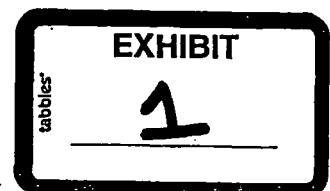
**YOUR PERSONAL AUTO POLICY
QUICK REFERENCE**

DECLARATIONS

Your Name and Address
Your Auto or Trailer
Policy Period
Coverage and Amounts of Insurance

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PERSONAL AUTO POLICY

AGREEMENT

In return for payment of the premium and subject to all the terms of this policy, we agree with you as follows:

DEFINITIONS

A. Throughout this policy, "you" and "your" refer to:

1. The "named insured" shown in the Declarations; and
2. The spouse if a resident of the same household.

If the spouse ceases to be a resident of the same household during the policy period or prior to the inception of this policy, the spouse will be considered "you" and "your" under this policy but only until the earlier of:

1. The end of 90 days following the spouse's change of residency;
2. The effective date of another policy listing the spouse as a named insured; or
3. The end of the policy period.

B. "We", "us" and "our" refer to the Company providing this insurance.

C. For purposes of this policy, a private passenger type auto, pickup or van shall be deemed to be owned by a person if leased:

1. Under a written agreement to that person; and
2. For a continuous period of at least 6 months.

Other words and phrases are defined. They are in quotation marks when used.

D. "Bodily injury" means bodily harm, sickness or disease, including death that results.

E. "Business" includes trade, profession or occupation.

F. "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child.

G. "Occupying" means in, upon, getting in, on, out or off.

H. "Property damage" means physical injury to, destruction of or loss of use of tangible property.

I. "Trailer" means a vehicle designed to be pulled by a:

1. Private passenger auto; or
2. Pickup or van.

It also means a farm wagon or farm implement while towed by a vehicle listed in 1. or 2. above.

J. "Your covered auto" means:

1. Any vehicle shown in the Declarations.
2. A "newly acquired auto".
3. Any "trailer" you own.
4. Any auto or "trailer" you do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:
 - a. Breakdown;
 - b. Repair;
 - c. Servicing;
 - d. Loss; or
 - e. Destruction.

This Provision (J.4.) does not apply to Coverage For Damage To Your Auto.

K. "Newly acquired auto":

1. "Newly acquired auto" means any of the following types of vehicles you become the owner of during the policy period:
 - a. A private passenger auto; or
 - b. A pickup or van, for which no other insurance policy provides coverage, that:

- (1) Has a Gross Vehicle Weight of less than 10,000 lbs.; and
 - (2) Is not used for the delivery or transportation of goods and materials unless such use is:
 - (a) Incidental to your "business" of installing, maintaining or repairing furnishings or equipment; or
 - (b) For farming or ranching.
2. Coverage for a "newly acquired auto" is provided as described below. If you ask us to insure a "newly acquired auto" after a specified time period described below has elapsed, any coverage we provide for a "newly acquired auto" will begin at the time you request the coverage.
 - a. For any coverage provided in this policy except Coverage For Damage To Your Auto, a "newly acquired auto" will have the broadest coverage we now provide for any vehicle shown in the Declarations. Coverage begins on the date you become the owner. However, for this coverage to apply to a "newly acquired auto" which is in addition to any vehicle shown in the Declarations, you must ask us to insure it within 14 days after you become the owner.

If a "newly acquired auto" replaces a vehicle shown in the Declarations, coverage is provided for this vehicle without your having to ask us to insure it.
 - b. Collision Coverage for a "newly acquired auto" begins on the date you become the owner. However, for this coverage to apply, you must ask us to insure it within:
 - (1) 14 days after you become the owner if the Declarations indicate that Collision Coverage applies to at least one auto. In this case, the "newly acquired auto" will have the broadest coverage we now provide for any auto shown in the Declarations.
 - (2) Four days after you become the owner if the Declarations do not indicate that Collision Coverage applies to at least one auto. If you comply with the 4 day requirement and a loss occurred before you asked us to insure the "newly acquired auto", a Collision deductible of \$500 will apply.
 - c. Other Than Collision Coverage for a "newly acquired auto" begins on the date you become the owner. However, for this coverage to apply, you must ask us to insure it within:
 - (1) 14 days after you become the owner if the Declarations indicate that Other Than Collision Coverage applies to at least one auto. In this case, the "newly acquired auto" will have the broadest coverage we now provide for any auto shown in the Declarations.
 - (2) Four days after you become the owner if the Declarations do not indicate that Other Than Collision Coverage applies to at least one auto. If you comply with the 4 day requirement and a loss occurred before you asked us to insure the "newly acquired auto", an Other Than Collision deductible of \$500 will apply.

PART A – LIABILITY COVERAGE

INSURING AGREEMENT

- A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured". We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or settlements. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.
- B. "Insured" as used in this Part means:
 1. You or any "family member" for the ownership, maintenance or use of any auto or "trailer".
 2. Any person using "your covered auto".
 3. For "your covered auto", any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.
 4. For any auto or "trailer", other than "your covered auto", any other person or organization but only with respect to legal responsibility for acts or omissions of you or any "family member" for whom coverage is afforded under this Part. This Provision (B.4.) applies only if the person or organization does not own or hire the auto or "trailer".

SUPPLEMENTARY PAYMENTS

In addition to our limit of liability, we will pay on behalf of an "insured":

1. Up to \$250 for the cost of bail bonds required because of an accident, including related traffic law violations. The accident must result in "bodily injury" or "property damage" covered under this policy.
2. Premiums on appeal bonds and bonds to release attachments in any suit we defend.
3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.
4. Up to \$200 a day for loss of earnings, but not other income, because of attendance at hearings or trials at our request.
5. Other reasonable expenses incurred at our request.

EXCLUSIONS

A. We do not provide Liability Coverage for any "insured":

1. Who intentionally causes "bodily injury" or "property damage".
2. For "property damage" to property owned or being transported by that "insured".
3. For "property damage" to property:
 - a. Rented to;
 - b. Used by; or
 - c. In the care of;that "insured".

This Exclusion (A.3.) does not apply to "property damage" to a residence or private garage.

4. For "bodily injury" to an employee of that "insured" during the course of employment. This Exclusion (A.4.) does not apply to "bodily injury" to a domestic employee unless workers' compensation benefits are required or available for that domestic employee.
5. For that "insured's" liability arising out of the ownership or operation of a vehicle while it is being used as a public or livery conveyance. This Exclusion (A.5.) does not apply to a share-the-expense car pool.
6. While employed or otherwise engaged in the "business" of:
 - a. Selling;
 - b. Repairing;
 - c. Servicing;
 - d. Storing; or
 - e. Parking;

vehicles designed for use mainly on public highways. This includes road testing and delivery. This Exclusion (A.6.) does not apply to the ownership, maintenance or use of "your covered auto" by:

- a. You;
 - b. Any "family member"; or
 - c. Any partner, agent or employee of you or any "family member".
7. Maintaining or using any vehicle while that "insured" is employed or otherwise engaged in any "business" (other than farming or ranching) not described in Exclusion A.6.

This Exclusion (A.7.) does not apply to the maintenance or use of a:

- a. Private passenger auto;
 - b. Pickup or van; or
 - c. "Trailer" used with a vehicle described in a. or b. above.
8. Using a vehicle without a reasonable belief that that "insured" is entitled to do so. This Exclusion (A.8.) does not apply to a "family member" using "your covered auto" which is owned by you.
 9. For "bodily injury" or "property damage" for which that "insured":
 - a. Is an insured under a nuclear energy liability policy; or
 - b. Would be an insured under a nuclear energy liability policy but for its termination upon exhaustion of its limit of liability.

A nuclear energy liability policy is a policy issued by any of the following or their successors:

- a. Nuclear Energy Liability Insurance Association;
- b. Mutual Atomic Energy Liability Underwriters; or
- c. Nuclear Insurance Association of Canada.

B. We do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle which:
 - a. Has fewer than four wheels; or
 - b. Is designed mainly for use off public roads.

This Exclusion (B.1.) does not apply:

- a. While such vehicle is being used by an "insured" in a medical emergency;
 - b. To any "trailer"; or
 - c. To any non-owned golf cart.
2. Any vehicle, other than "your covered auto", which is:
 - a. Owned by you; or
 - b. Furnished or available for your regular use.
 3. Any vehicle, other than "your covered auto", which is:
 - a. Owned by any "family member"; or
 - b. Furnished or available for the regular use of any "family member".

However, this Exclusion (B.3.) does not apply to you while you are maintaining or "occupying" any vehicle which is:

- a. Owned by a "family member"; or
 - b. Furnished or available for the regular use of a "family member".
4. Any vehicle, located inside a facility designed for racing, for the purpose of:
 - a. Competing in; or
 - b. Practicing or preparing for;
- any prearranged or organized racing or speed contest.

LIMIT OF LIABILITY

A. The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of "bodily injury" sustained by any one person in any one auto accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Bodily Injury Liability is our maximum limit of liability for all damages for "bodily injury" resulting from any one auto accident.

The limit of liability shown in the Declarations for each accident for Property Damage Liability is our maximum limit of liability for all "property damage" resulting from any one auto accident.

This is the most we will pay regardless of the number of:

1. "Insureds";
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the auto accident.

B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:

1. Part B or Part C of this policy; or
2. Any Underinsured Motorists Coverage provided by this policy.

OUT OF STATE COVERAGE

If an auto accident to which this policy applies occurs in any state or province other than the one in which "your covered auto" is principally garaged, we will interpret your policy for that accident as follows:

A. If the state or province has:

1. A financial responsibility or similar law specifying limits of liability for "bodily injury" or "property damage" higher than the limit shown in the Declarations, your policy will provide the higher specified limit.
2. A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage.

B. No one will be entitled to duplicate payments for the same elements of loss.

FINANCIAL RESPONSIBILITY

When this policy is certified as future proof of financial responsibility, this policy shall comply with the law to the extent required.

OTHER INSURANCE

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

PART B – MEDICAL PAYMENTS COVERAGE

INSURING AGREEMENT

A. We will pay reasonable expenses incurred for necessary medical and funeral services because of "bodily injury":

1. Caused by accident; and
2. Sustained by an "insured".

We will pay only those expenses incurred for services rendered within 3 years from the date of the accident.

B. "Insured" as used in this Part means:

1. You or any "family member":
 - a. While "occupying"; or
 - b. As a pedestrian when struck by;
a motor vehicle designed for use mainly on public roads or a trailer of any type.
2. Any other person while "occupying" "your covered auto".

EXCLUSIONS

We do not provide Medical Payments Coverage for any "insured" for "bodily injury":

1. Sustained while "occupying" any motorized vehicle having fewer than four wheels.
2. Sustained while "occupying" "your covered auto" when it is being used as a public or livery conveyance. This Exclusion (2.) does not apply to a share-the-expense car pool.
3. Sustained while "occupying" any vehicle located for use as a residence or premises.
4. Occurring during the course of employment if workers' compensation benefits are required or available for the "bodily injury".
5. Sustained while "occupying", or when struck by, any vehicle (other than "your covered auto") which is:
 - a. Owned by you; or
 - b. Furnished or available for your regular use.
6. Sustained while "occupying", or when struck by, any vehicle (other than "your covered auto") which is:
 - a. Owned by any "family member"; or
 - b. Furnished or available for the regular use of any "family member".However, this Exclusion (6.) does not apply to you.
7. Sustained while "occupying" a vehicle without a reasonable belief that that "insured" is entitled to do so. This Exclusion (7.) does not apply to a "family member" using "your covered auto" which is owned by you.

8. Sustained while "occupying" a vehicle when it is being used in the "business" of an "insured". This Exclusion (8.) does not apply to "bodily injury" sustained while "occupying" a:
 - a. Private passenger auto;
 - b. Pickup or van that you own; or
 - c. "Trailer" used with a vehicle described in a. or b. above.
9. Caused by or as a consequence of:
 - a. Discharge of a nuclear weapon (even if accidental);
 - b. War (declared or undeclared);
 - c. Civil war;
 - d. Insurrection; or
 - e. Rebellion or revolution.
10. From or as a consequence of the following, whether controlled or uncontrolled or however caused:
 - a. Nuclear reaction;
 - b. Radiation; or
 - c. Radioactive contamination.
11. Sustained while "occupying" any vehicle located inside a facility designed for racing, for the purpose of:
 - a. Competing in; or
 - b. Practicing or preparing for;any prearranged or organized racing or speed contest.

LIMIT OF LIABILITY

- A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for each person injured in any one accident. This is the most we will pay regardless of the number of:
 1. "Insureds";
 2. Claims made;
 3. Vehicles or premiums shown in the Declarations; or
 4. Vehicles involved in the accident.
- B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:
 1. Part A or Part C of this policy; or
 2. Any Underinsured Motorists Coverage provided by this policy.

OTHER INSURANCE

If there is other applicable auto medical payments insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible auto insurance providing payments for medical or funeral expenses.

PART C – UNINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

- A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" because of "bodily injury":
 1. Sustained by an "insured"; and
 2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle".

Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

- B. "Insured" as used in this Part means:
1. You or any "family member".
 2. Any other person "occupying" "your covered auto".
 3. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in 1. or 2. above.
- C. "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
1. To which no bodily injury liability bond or policy applies at the time of the accident.
 2. To which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged.
 3. Which is a hit-and-run vehicle whose operator or owner cannot be identified and which hits:
 - a. You or any "family member";
 - b. A vehicle which you or any "family member" are "occupying"; or
 - c. "Your covered auto".
 4. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:
 - a. Denies coverage; or
 - b. Is or becomes insolvent.

However, "uninsured motor vehicle" does not include any vehicle or equipment:

1. Owned by or furnished or available for the regular use of you or any "family member".
2. Owned or operated by a self-insurer under any applicable motor vehicle law, except a self-insurer which is or becomes insolvent.
3. Owned by any governmental unit or agency.
4. Operated on rails or crawler treads.
5. Designed mainly for use off public roads while not on public roads.
6. While located for use as a residence or premises.

EXCLUSIONS

- A. We do not provide Uninsured Motorists Coverage for "bodily injury" sustained:
1. By an "insured" while "occupying", or when struck by, any motor vehicle owned by that "insured" which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.
 2. By any "family member" while "occupying", or when struck by, any motor vehicle you own which is insured for this coverage on a primary basis under any other policy.
- B. We do not provide Uninsured Motorists Coverage for "bodily injury" sustained by any "insured":
1. If that "insured" or the legal representative settles the "bodily injury" claim without our consent.
 2. While "occupying" "your covered auto" when it is being used as a public or livery conveyance. This Exclusion (B.2.) does not apply to a share-the-expense car pool.
 3. Using a vehicle without a reasonable belief that that "insured" is entitled to do so. This Exclusion (B.3.) does not apply to a "family member" using "your covered auto" which is owned by you.
- C. This coverage shall not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar law:
1. Workers' compensation law; or
 2. Disability benefits law.
- D. We do not provide Uninsured Motorists Coverage for punitive or exemplary damages.

LIMIT OF LIABILITY

- A. The limit of liability shown in the Declarations for each person for Uninsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of "bodily injury" sustained by any one person in any one accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Uninsured Motorists Coverage is our maximum limit of liability for all damages for "bodily injury" resulting from any one accident.

This is the most we will pay regardless of the number of:

1. "Insureds";
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:

1. Part A. or Part B. of this policy; or
2. Any Underinsured Motorists Coverage provided by this policy.

C. We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.

D. We will not pay for any element of loss if a person is entitled to receive payment for the same element of loss under any of the following or similar law:

1. Workers' compensation law; or
2. Disability benefits law.

OTHER INSURANCE

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided under this Part of the policy:

1. Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.
2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing such coverage on a primary basis.
3. If the coverage under this policy is provided:
 - a. On a primary basis, we will pay only our share of the loss that must be paid under insurance providing coverage on a primary basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on a primary basis.
 - b. On an excess basis, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on an excess basis.

ARBITRATION

A. If we and an "insured" do not agree:

1. Whether that "insured" is legally entitled to recover damages; or
2. As to the amount of damages which are recoverable by that "insured";

from the owner or operator of an "uninsured motor vehicle", then the matter may be arbitrated. However, disputes concerning coverage under this Part may not be arbitrated.

Both parties must agree to arbitration. If so agreed, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.

B. Each party will:

1. Pay the expenses it incurs; and
2. Bear the expenses of the third arbitrator equally.

C. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:

1. Whether the "insured" is legally entitled to recover damages; and
2. The amount of damages. This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial. This demand must be made within 60 days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding.

PART D – COVERAGE FOR DAMAGE TO YOUR AUTO

INSURING AGREEMENT

A. We will pay for direct and accidental loss to "your covered auto" or any "non-owned auto", including their equipment, minus any applicable deductible shown in the Declarations. If loss to more than one "your covered auto" or "non-owned auto" results from the same "collision", only the highest applicable deductible will apply. We will pay for loss to "your covered auto" caused by:

1. Other than "collision" only if the Declarations indicate that Other Than Collision Coverage is provided for that auto.
2. "Collision" only if the Declarations indicate that Collision Coverage is provided for that auto.

If there is a loss to a "non-owned auto", we will provide the broadest coverage applicable to any "your covered auto" shown in the Declarations.

B. "Collision" means the upset of "your covered auto" or a "non-owned auto" or their impact with another vehicle or object.

Loss caused by the following is considered other than "collision":

1. Missiles or falling objects;
2. Fire;
3. Theft or larceny;
4. Explosion or earthquake;
5. Windstorm;
6. Hail, water or flood;
7. Malicious mischief or vandalism;
8. Riot or civil commotion;
9. Contact with bird or animal; or
10. Breakage of glass.

If breakage of glass is caused by a "collision", you may elect to have it considered a loss caused by "collision".

C. "Non-owned auto" means:

1. Any private passenger auto, pickup, van or "trailer" not owned by or furnished or available for the regular use of you or any "family member" while in the custody of or being operated by you or any "family member"; or
2. Any auto or "trailer" you do not own while used as a temporary substitute for "your covered auto" which is out of normal use because of its:
 - a. Breakdown;
 - b. Repair;
 - c. Servicing;
 - d. Loss; or
 - e. Destruction.

TRANSPORTATION EXPENSES

A. In addition, we will pay, without application of a deductible, up to a maximum of \$600 for:

1. Temporary transportation expenses not exceeding \$20 per day incurred by you in the event of a loss to "your covered auto". We will pay for such expenses if the loss is caused by:
 - a. Other than "collision" only if the Declarations indicate that Other Than Collision Coverage is provided for that auto.
 - b. "Collision" only if the Declarations indicate that Collision Coverage is provided for that auto.

2. Expenses for which you become legally responsible in the event of loss to a "non-owned auto". We will pay for such expenses if the loss is caused by:
 - a. Other than "collision" only if the Declarations indicate that Other Than Collision Coverage is provided for any "your covered auto".
 - b. "Collision" only if the Declarations indicate that Collision Coverage is provided for any "your covered auto".

However, the most we will pay for any expenses for loss of use is \$20 per day.

B. If the loss is caused by:

1. A total theft of "your covered auto" or a "non-owned auto", we will pay only expenses incurred during the period:
 - a. Beginning 48 hours after the theft; and
 - b. Ending when "your covered auto" or the "non-owned auto" is returned to use or we pay for its loss.
2. Other than theft of a "your covered auto" or a "non-owned auto", we will pay only expenses beginning when the auto is withdrawn from use for more than 24 hours.

C. Our payment will be limited to that period of time reasonably required to repair or replace the "your covered auto" or the "non-owned auto".

EXCLUSIONS

We will not pay for:

1. Loss to "your covered auto" or any "non-owned auto" which occurs while it is being used as a public or livery conveyance. This Exclusion (1.) does not apply to a share-the-expense car pool.
2. Damage due and confined to:
 - a. Wear and tear;
 - b. Freezing;
 - c. Mechanical or electrical breakdown or failure; or
 - d. Road damage to tires.

This Exclusion (2.) does not apply if the damage results from the total theft of "your covered auto" or any "non-owned auto".

3. Loss due to or as a consequence of:
 - a. Radioactive contamination;
 - b. Discharge of any nuclear weapon (even if accidental);
 - c. War (declared or undeclared);
 - d. Civil war;
 - e. Insurrection; or
 - f. Rebellion or revolution.
4. Loss to any electronic equipment designed for the reproduction of sound and any accessories used with such equipment. This includes but is not limited to:
 - a. Radios and stereos;
 - b. Tape decks; or
 - c. Compact disc players.

This Exclusion (4.) does not apply to equipment designed solely for the reproduction of sound and accessories used with such equipment, provided:

- a. The equipment is permanently installed in "your covered auto" or any "non-owned auto"; or
- b. The equipment is:
 - (1) Removable from a housing unit which is permanently installed in the auto;
 - (2) Designed to be solely operated by use of the power from the auto's electrical system; and
 - (3) In or upon "your covered auto" or any "non-owned auto" at the time of loss.

5. Loss to any electronic equipment that receives or transmits audio, visual or data signals and any accessories used with such equipment. This includes but is not limited to:
 - a. Citizens band radios;
 - b. Telephones;
 - c. Two-way mobile radios;
 - d. Scanning monitor receivers;
 - e. Television monitor receivers;
 - f. Video cassette recorders;
 - g. Audio cassette recorders; or
 - h. Personal computers.

This Exclusion (5.) does not apply to:

- a. Any electronic equipment that is necessary for the normal operation of the auto or the monitoring of the auto's operating systems; or
 - b. A permanently installed telephone designed to be operated by use of the power from the auto's electrical system and any accessories used with the telephone.
6. Loss to tapes, records, discs or other media used with equipment described in Exclusions 4. and 5.
 7. A total loss to "your covered auto" or any "non-owned auto" due to destruction or confiscation by governmental or civil authorities.

This Exclusion (7.) does not apply to the interests of Loss Payees in "your covered auto".

8. Loss to:
 - a. A "trailer", camper body, or motor home, which is not shown in the Declarations; or
 - b. Facilities or equipment used with such "trailer", camper body or motor home. Facilities or equipment include but are not limited to:
 - (1) Cooking, dining, plumbing or refrigeration facilities;
 - (2) Awnings or cabanas; or
 - (3) Any other facilities or equipment used with a "trailer", camper body, or motor home.

This Exclusion (8.) does not apply to a:

- a. "Trailer", and its facilities or equipment, which you do not own; or
 - b. "Trailer", camper body, or the facilities or equipment in or attached to the "trailer" or camper body, which you:
 - (1) Acquire during the policy period; and
 - (2) Ask us to insure within 14 days after you become the owner.
9. Loss to any "non-owned auto" when used by you or any "family member" without a reasonable belief that you or that "family member" are entitled to do so.
 10. Loss to equipment designed or used for the detection or location of radar or laser.
 11. Loss to any custom furnishings or equipment in or upon any pickup or van. Custom furnishings or equipment include but are not limited to:
 - a. Special carpeting or insulation;
 - b. Furniture or bars;
 - c. Height-extending roofs; or
 - d. Custom murals, paintings or other decals or graphics.

This Exclusion (11.) does not apply to a cap, cover or bedliner in or upon any "your covered auto" which is a pickup.

12. Loss to any "non-owned auto" being maintained or used by any person while employed or otherwise engaged in the "business" of:
 - a. Selling;
 - b. Repairing;
 - c. Servicing;
 - d. Storing; or
 - e. Parking;vehicles designed for use on public highways. This includes road testing and delivery.
13. Loss to "your covered auto" or any "non-owned auto", located inside a facility designed for racing, for the purpose of:
 - a. Competing in; or
 - b. Practicing or preparing for;any prearranged or organized racing or speed contest.
14. Loss to, or loss of use of, a "non-owned auto" rented by:
 - a. You; or
 - b. Any "family member";if a rental vehicle company is precluded from recovering such loss or loss of use, from you or that "family member", pursuant to the provisions of any applicable rental agreement or state law.

LIMIT OF LIABILITY

- A. Our limit of liability for loss will be the lesser of the:
 1. Actual cash value of the stolen or damaged property; or
 2. Amount necessary to repair or replace the property with other property of like kind and quality.However, the most we will pay for loss to:
 1. Any "non-owned auto" which is a trailer is \$500.
 2. Equipment designed solely for the reproduction of sound, including any accessories used with such equipment, which is installed in locations not used by the auto manufacturer for installation of such equipment or accessories, is \$1,000.
- B. An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total loss.
- C. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment.

PAYMENT OF LOSS

We may pay for loss in money or repair or replace the damaged or stolen property. We may, at our expense, return any stolen property to:

1. You; or
2. The address shown in this policy.

If we return stolen property we will pay for any damage resulting from the theft. We may keep all or part of the property at an agreed or appraised value.

If we pay for loss in money, our payment will include the applicable sales tax for the damaged or stolen property.

NO BENEFIT TO BAILEE

This insurance shall not directly or indirectly benefit any carrier or other bailee for hire.

OTHER SOURCES OF RECOVERY

If other sources of recovery also cover the loss, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a "non-owned auto" shall be excess over any other collectible source of recovery including, but not limited to:

1. Any coverage provided by the owner of the "non-owned auto";
2. Any other applicable physical damage insurance;
3. Any other source of recovery applicable to the loss.

APPRAISAL

- A. If we and you do not agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will select a competent appraiser. The two appraisers will select an umpire. The appraisers will state separately the actual cash value and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
1. Pay its chosen appraiser; and
 2. Bear the expenses of the appraisal and umpire equally.
- B. We do not waive any of our rights under this policy by agreeing to an appraisal.
-

PART E – DUTIES AFTER AN ACCIDENT OR LOSS

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.
- B. A person seeking any coverage must:
1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.
 3. Submit, as often as we reasonably require:
 - a. To physical exams by physicians we select. We will pay for these exams.
 - b. To examination under oath and subscribe the same.
 4. Authorize us to obtain:
 - a. Medical reports; and
 - b. Other pertinent records.
 5. Submit a proof of loss when required by us.
- C. A person seeking Uninsured Motorists Coverage must also:
1. Promptly notify the police if a hit-and-run driver is involved.
 2. Promptly send us copies of the legal papers if a suit is brought.
- D. A person seeking Coverage For Damage To Your Auto must also:
1. Take reasonable steps after loss to protect "your covered auto" or any "non-owned auto" and their equipment from further loss. We will pay reasonable expenses incurred to do this.
 2. Promptly notify the police if "your covered auto" or any "non-owned auto" is stolen.
 3. Permit us to inspect and appraise the damaged property before its repair or disposal.
-

PART F – GENERAL PROVISIONS

BANKRUPTCY

Bankruptcy or insolvency of the "insured" shall not relieve us of any obligations under this policy.

CHANGES

- A. This policy contains all the agreements between you and us. Its terms may not be changed or waived except by endorsement issued by us.
- B. If there is a change to the information used to develop the policy premium, we may adjust your premium. Changes during the policy term that may result in a premium increase or decrease include, but are not limited to, changes in:
1. The number, type or use classification of insured vehicles;
 2. Operators using insured vehicles;
 3. The place of principal garaging of insured vehicles;
 4. Coverage, deductible or limits.

If a change resulting from A. or B. requires a premium adjustment, we will make the premium adjustment in accordance with our manual rules.

C. If we make a change which broadens coverage under this edition of your policy without additional premium charge, that change will automatically apply to your policy as of the date we implement the change in your state. This Paragraph (C.) does not apply to changes implemented with a general program revision that includes both broadenings and restrictions in coverage, whether that general program revision is implemented through introduction of:

1. A subsequent edition of your policy; or
2. An Amendatory Endorsement.

FRAUD

We do not provide coverage for any "insured" who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.

LEGAL ACTION AGAINST US

A. No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under Part A, no legal action may be brought against us until:

1. We agree in writing that the "insured" has an obligation to pay; or
2. The amount of that obligation has been finally determined by judgment after trial.

B. No person or organization has any right under this policy to bring us into any action to determine the liability of an "insured".

OUR RIGHT TO RECOVER PAYMENT

A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:

1. Whatever is necessary to enable us to exercise our rights; and
2. Nothing after loss to prejudice them.

However, our rights in this Paragraph (A.) do not apply under Part D, against any person using "your covered auto" with a reasonable belief that that person is entitled to do so.

B. If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:

1. Hold in trust for us the proceeds of the recovery; and
2. Reimburse us to the extent of our payment.

POLICY PERIOD AND TERRITORY

A. This policy applies only to accidents and losses which occur:

1. During the policy period as shown in the Declarations; and
2. Within the policy territory.

B. The policy territory is:

1. The United States of America, its territories or possessions;
2. Puerto Rico; or
3. Canada.

This policy also applies to loss to, or accidents involving, "your covered auto" while being transported between their ports.

TERMINATION

A. Cancellation

This policy may be cancelled during the policy period as follows:

1. The named insured shown in the Declarations may cancel by:
 - a. Returning this policy to us; or
 - b. Giving us advance written notice of the date cancellation is to take effect.
2. We may cancel by mailing to the named insured shown in the Declarations at the address shown in this policy:

- a. At least 10 days notice:
 - (1) If cancellation is for nonpayment of premium; or
 - (2) If notice is mailed during the first 60 days this policy is in effect and this is not a renewal or continuation policy; or
 - b. At least 20 days notice in all other cases.
3. After this policy is in effect for 60 days, or if this is a renewal or continuation policy, we will cancel only:
- a. For nonpayment of premium; or
 - b. If your driver's license or that of:
 - (1) Any driver who lives with you; or
 - (2) Any driver who customarily uses "your covered auto";
 has been suspended or revoked. This must have occurred:
 - (1) During the policy period; or
 - (2) Since the last anniversary of the original effective date if the policy period is other than 1 year; or
 - c. If the policy was obtained through material misrepresentation.

B. Nonrenewal

If we decide not to renew or continue this policy, we will mail notice to the named insured shown in the Declarations at the address shown in this policy. Notice will be mailed at least 20 days before the end of the policy period. Subject to this notice requirement, if the policy period is:

- 1. Less than 6 months, we will have the right not to renew or continue this policy every 6 months, beginning 6 months after its original effective date.
- 2. 6 months or longer, but less than one year, we will have the right not to renew or continue this policy at the end of the policy period.
- 3. 1 year or longer, we will have the right not to renew or continue this policy at each anniversary of its original effective date.

C. Automatic Termination

If we offer to renew or continue and you or your representative do not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due shall mean that you have not accepted our offer.

If you obtain other insurance on "your covered auto", any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.

D. Other Termination Provisions

- 1. We may deliver any notice instead of mailing it. Proof of mailing of any notice shall be sufficient proof of notice.
- 2. If this policy is cancelled, you may be entitled to a premium refund. If so, we will send you the refund. The premium refund, if any, will be computed according to our manuals. However, making or offering to make the refund is not a condition of cancellation.
- 3. The effective date of cancellation stated in the notice shall become the end of the policy period.

TRANSFER OF YOUR INTEREST IN THIS POLICY

- A. Your rights and duties under this policy may not be assigned without our written consent. However, if a named insured shown in the Declarations dies, coverage will be provided for:
 - 1. The surviving spouse if resident in the same household at the time of death. Coverage applies to the spouse as if a named insured shown in the Declarations; and
 - 2. The legal representative of the deceased person as if a named insured shown in the Declarations. This applies only with respect to the representative's legal responsibility to maintain or use "your covered auto".
- B. Coverage will only be provided until the end of the policy period.

TWO OR MORE AUTO POLICIES

If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.

FULL SAFETY GLASS COVERAGE - SOUTH CAROLINA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COVERAGE FOR DAMAGE TO YOUR AUTO

With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by this endorsement.

The following is added to paragraph A of the Insuring Agreement in Part D:

We will pay under Other Than Collision Coverage or under Collision Coverage for loss to safety glass on "your covered auto" without applying a deductible.

This endorsement must be attached to the Change Endorsement when issued after the policy is written.

PP 03 41 (11 96)

Copyright, Insurance Services Office, Inc., 1996

... and your local independent agent present:

KEMPER CLEAR CHOICE CLAIM SERVICE®

Automobile Glass and Body Repair 24/7

In today's busy world you can't afford to have damage to your automobile keep you off the road. Call toll-free 1-888-252-2799 and we will assist you in handling all of your automobile glass or body damage claim needs, quickly and easily.

- **Accessible** -- You can call 24 hours a day, seven days a week, for fast, instant claim service.
- **Simple** -- There's no paperwork required from you.
- **Convenient** -- We will arrange repair of your automobile at a convenient location.
- **Workmanship guaranteed** -- If you utilize a shop that is part of our network, we warranty the work for as long as you own or lease your vehicle.

Interested? Here's how you can put Kemper Clear Choice Claim Service® to work for you:

Have your policy number handy and dial our toll-free claim reporting hotline at
1-888-252-2799.

- *To report auto "glass only" damage* *Select Option # 1, then Option # 1*
A customer service representative records your claim information and verifies your insurance coverage in just minutes and then links you with a repair facility for the work to be performed at the shop, your home or business. Whichever is most convenient for you. Remember, as always with Kemper Clear Choice Claim Service®, if your glass damage can safely be repaired, we waive any applicable deductible so your repair is **free**.
- *To report "more than just glass" damage to your auto* *Select Option # 1, then Option # 3*
A customer service representative records your claim information and verifies your insurance coverage in just minutes and then assists you in your selecting the repair facility most convenient for you.

That's all there is to it. So when you need us call
Kemper Clear Choice Claim Service® Toll-Free at 1-888-252-2799.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Civil Action No.: 2009-CP-40-7516

Southern Glass & Plastics Company, Inc.,

Plaintiff,

vs.

Kemper, A Unitrin Business.

Defendants.

AFFIDAVIT OF BRAD BOARDMAN

PERSONALLY APPEARED BEFORE ME, the undersigned, who after being duly sworn, deposes and says:

1. I oversee the national glass program for automobile coverage for Kemper, a Unitrin Business ("Kemper");

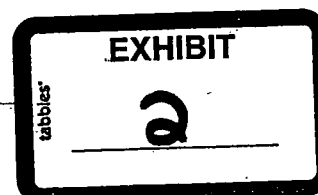
2. I am authorized to give the following information regarding Kemper:

3. Kemper handles automobile glass claims through a third-party administrator, Safelite Solutions. Safelite Solutions simplifies claim handling for Kemper, insured's and shops.

4. Kemper reviews industry data for glass claims several times each year and determines whether rates are fair and reasonable for given areas.

5. When Kemper revises its rates, it notifies network and non-network glass shops in advance of the fair and reasonable rates it approves for glass claims. Kemper does not dictate what the shops should charge a customer, Kemper merely informs the shops what it is paying based on the insured's automobile policy and law.

6. Rates are also shared with insured's and shops when the insured contacts Kemper, via Safelite, to report the glass claim. A customer service representative at Safelite contacts the shop of the claimant's choice during the claim call to inform them of the rates before the shop



begins working on the claimant's vehicle.

7. After the shop agrees or understands what the rates are being paid by Kemper via Safelite on the phone, the shop receives a referral sheet once again confirming the rates Kemper will pay before shop begins working on the claimant's vehicle.

8. When the glass work has been completed, Kemper pays the claim based on the rate pre-notified and usually agreed upon by the glass shop. Kemper's fair and reasonable rates are accepted/agreed to by more than 98% of all shops up front.

9. Regarding all invoices relevant to this matter, Kemper paid more than the lowest fair and reasonable pricing available to them for the locations and the amounts paid were all much higher than Southern Glass & Plastics Company, Inc routinely charges customers for the same glass on a walk-in or cash type basis.

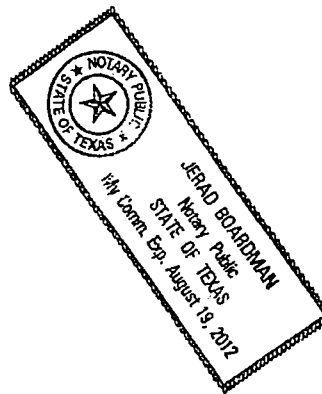
FURTHER AFFIANT SAYETH NOT

RRR

SWORN to and subscribed before me

This 10 day of June, 2010

[Signature] (L.S.)
Notary Public for Florida
My Commission Expires: Aug 19 2012



9172571.txt

Bobcat
F9

S A F E L I T E S O L U T I O N S

Date: 03/25/09
Time: 13:51:33

To: SOUTHERN GLASS & PLA Shop#: 022035
 310 N POLK ST Fax: 704-889-7883
 PINEVILLE NC 28134 Tel: 704 889 7878 Referral# 917257

Customer: KEEFE, MATTHEW Home: 704-248-8385
 3511 HERKIMER DR Bus: 704-989-2620 Date of loss: 03/20/2009
 MONROE NC 28110

Vehicle: 2005 GMC ENVOY
 Type of Loss: REPLACE WINDSHIELD
 Deductible: \$.00

W/S LIST: -37.0% LABR: \$41.00 PER HOUR
 C/T LIST: -37.0% LABR: \$41.00 PER HOUR
 KIT: \$15.00 2KIT: \$30.00 H/M KIT: \$25.00 H/M 2KIT: \$45.00

KEMPER has determined the maximum amount of such work is : \$ 453.81 less any applicable deductible amount
 - If the cost of the claim is going to be more than \$2,500, please call 1-614-602-2120 before beginning any work on the vehicle
 If the work is performed by a location other than the shop listed above, the rates are subject to change.

Notice:

Please contact Safelite at 1-614-602-2120 prior to beginning the work for any part not priced by NAGS, including but not limited to RV, sunroofs, OEM, dealer, net priced, premium, other charges and any molding parts. Performance of services constitutes acceptance of the communicated price and billing instructions.

INSHOP SERVICE
COMPANY: KEMPER

ID#: 09022 EDI MAILBOX: SAFL SAFL107

Billing Instructions

Sold To: KEEFE, MATTHEW Please Show On Your Invoice
 Bill To: KEMPER 1) Referral#: 917257
 Address: PO BOX 182277 2) Full Vehicle Vin Number
 COLUMBUS, OH 43218-2277 3) Valid NAGS Part Numbers
 or, Invoice Online at SGCNetwork.com 4) Customer's Signature

- You must include sales tax on your invoice if applicable.
- Payment will be rendered upon receipt of funds from the client.
- If multiple glass parts, and vehicle over 6 years old, call for approval.
- Invoices should be submitted within 10 days of installation.
- KEMPER will not reimburse for deductibles not collected.

Authorization To Pay:

I acknowledge receipt of goods and services requested and that all services were performed in a workmanlike manner to my complete satisfaction. I authorize my insurance, fleet, or leasing company to pay SOUTHERN GLASS & PLA directly for this claim. I understand I am personally responsible for payment of all or any portion of this invoice not covered by my insurance, fleet, or leasing company.

Customer Signature _____ Date _____
 Please return your invoice signed by the customer, along with this signed fax
 Shop Owner/Mgr Signature _____ Date _____

EXHIBIT

3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Civil Action No.: 2009-CP-40-7516

Southern Glass & Plastics Company, Inc.,

Plaintiff,

CERTIFICATE OF SERVICE

vs.

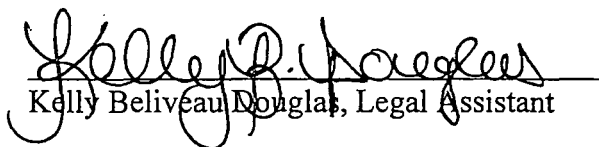
Kemper, A Unitrin Business.

Defendants.

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for Defendants, do hereby certify that I have served a copy of the foregoing, Memorandum in Support of Motion for Summary Judgment, in connection with the above-referenced case by mailing a copy of the same by hand delivery to the following address:

Robert L. Jackson
Jackson & Jackson
P.O. Box 7065
1415 Richland Street
Columbia, SC 29202

Columbia, South Carolina
June 11, 2010


Kelly Beliveau Douglas, Legal Assistant

COPY

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Southern Glass & Plastics Co. Inc.,)
)
Plaintiff,)
)
vs.)
)
Kemper, A Unitrin Business.)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS

09CP40-7516

AFFIDAVIT OF ALAN S. EMLEY

2010 JUN 29 AM 10:27
JEANETTE W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

The undersigned, being duly sworn before a Notary Public, states as follows:

1. I am the President and sole shareholder of Southern Glass & Plastics Company, Inc.
2. Safelite is the third party administrator for Kemper claims and does call Southern Glass concerning what Kemper will pay on any given claim submitted by Kemper's insureds.
3. Each time Safelite calls to inform us of the rates, we tell the employee of Safelite that Southern Glass does not accept the quoted rates.
4. Kemper alleges that based upon its procedure of notifying the glass companies in advance, a unilateral contract is created if and when the glass company performs the work.
5. I have informed Safelite on more than one occasion that no contract is created when my company does the work.
6. I have also notified Kemper and other insurance companies, directly or through Safelite, that our only contract is with our customer, the insured and the

EXHIBIT "1"

customer has assigned to Southern Glass its right to receive payment pursuant to the terms of the policy.

7. Kemper and most insurance companies that use Safelite as its claims administrator, claim that they are not dictating what the glass companies should charge, they are merely informing the glass companies what they will pay.

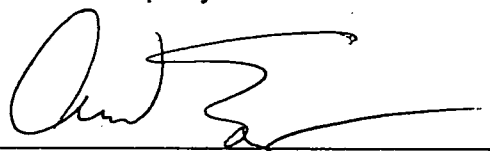
8. What they are, in fact doing, is dictating what is fair and reasonable and that figure is the amount they will pay, NOTWITHSTANDING THE FACT that its contract with the insured says that its limit of liability for loss will be the lesser of the:

1. Actual cash values of the stolen or damaged property; or
2. Amount necessary to repair or replace the property with other property of like kind and quality.

The contract says nothing about "fair and reasonable" for given areas.

9. Southern Glass charges its customers only the amount necessary to repair or replace the property with other property of like kind and quality.

10. The fact that Southern Glass honors its contract with its customer, does not equate to a unilateral contract with the insurance company.



Alan S. Epley

Sworn to before me
this 22 day of June, 2010


Notary Public for South Carolina
My Commission Expires: 1/31/15

South Carolina Summary Court



2009CP4007516

Judge William H. Womble, Jr.

Waverly Magistrate, Richland County

Municipal Judge, City of Forest Acres

Chief Judge, Richland County

2712 Middleburg Drive
Middleburg Plaza, Suite 106
Columbia, South Carolina 29204

Phone (803) 576-2590
Facsimile (803) 576-2599
womblew@rcgov.us

Notification of Transfer of Case

TO: Plaintiff:

Southern Glass & Plastics Company
1819 Taylor St.
Columbia, SC 29201

Defendant:

Kemper Casualty Insurance Company
1 Kemper Drive, Lic. F-3
Long Grove, IL 60049

From:

Lauren Hugg, Summary Law Clerk

Civil Case Number:

OCT 20 2009
2009CV401102356

Note:

This is a Summons & Complaint Counterclaim, and the counterclaim is more than \$7,500.00. This case is transferred to Common Pleas. If you have any questions regarding this case, please do not hesitate to contact Judge Womble's office at 803-576-2590.

2009 OCT 22 PM 12:08
JEANETTE W. McBRIDE
C.C.P. & C.S.

RICHLAND COUNTY
FILED

Re: Southern Glass and Plastics Company, Inc. vs. Kemper Casualty Insurance Company
Civil Action No.: 2009CV401102356
Claim No.: 900 AF 185222.
Insured: Kemper, A Unitrun Business
Our File No.: 5050-0001

RECORDING REGARDING LUTHER MCDANIEL

Q: Ryan Stewart-Kemper Clear Choice Claims Service
A: Alexis-Southern Glass and Plastics
B: Luther McDaniel

Q: Thank you for calling the Kemper Clear Choice Claims Service. My name is Ryan Stewart, how may I help you?

A: Hello, this is Alexis at Southern Glass and Plastics and I have a glass only claim.

Q: Sure. Um, is this a new claim?

A: Yes.

Q: Okay. And may I have the spelling of your first name?

A: My first name is A-L-E-X-I-S.

Q: L-E. I'm sorry, A-L-E-X-I-S.

A: Yes, ma'am.

Q: And your last name?

A: F-R-E-B-E-R-I-C-K.

Q: Thank you. And you are at the shop, ma'am?

A: Yes, ma'am.

Q: Is this a personal or a company vehicle?

A: Personal.

Q: And it is glass only?

A: Yes.

Q: Thank you. And do you have the policyholder with you, ma'am?

A: I do.

Q: May I speak with them?

A: Hold on one second.

Q: Thank you. I appreciate it.

Q: Hello? Hello?

A: Mr. McDaniels is on the line.

B: Yes.

Q: Thank you. Hello, Mr. McDaniel. My name is Ryan Stewart and I am with the Kemper Clear Choice Claim Service.

B: Oh, yeah, I'm here.

Q: Okay. And before I proceed, sir, I must inform that your call is being handled and recorded by Safelite Solutions and Safelite Solutions is financially affiliated with Safelite Auto Glass and sir, what state does ... appears on your policy? Hello?

B: Hello, I'm still here.

Q: What state is on your policy?

B: Pardon me?

Q: What state do you live in?

B: South Carolina.

Q: Thank you. And was anybody injured as a result of the damage?

B: No, the window, the back window in the truck is coming out. It's just loose, that's all.

Q: And has the work been completed yet?

B: Hold on minute. Hold on one second.

Q: Has the work been....

A: No, it hasn't.

Q: Thank you.

B: Okay. Say again.

Q: And sir, may I have your first name?

B: Luther.

Q: Your first name.

B: Luther.

Q: L-U-T-H-E-R?

B: Right.

Q: And your last name. M-C-D-A-I-N-L-E-S?

B: Uh-uh. M-C-D-A-N-I-E-L.

Q: M-C-D-A-N-I-E-L?

B: I-E-L.

Q: I-E-L?

B: Uh-huh.

Q: Thank you. And may I have your telephone number, area code first?

B: Uh, that's my home phone number. It's 7-8...8-0-3-7-8-6-6-4-8-5.

Q: Thank you.

B: Cell is 2-1-0...2-1-0-7-8-3-4. 8-0-3 area code.

Q: 2-1-0, what was the last four?

B: 2-1-0-7-8-3-4.

Q: I have your first telephone number as 8-0-3-7-8-6-6-4-8-5 and your second is...

B: 6-4-8-5.

Q: And your second is 8-0-3-2-1-0-7-8-3-4?

B: 8-0-3-7-8-6-6-4-8-5.

Q: Okay. And may I have...do you have an e-mail address where I can send you a onetime confirmation of the claim?

B: McDee

Q: I apologize, what is it?

B: McDee at yahoo dot com.

Q: What is it, sir, I can't hear you?

B: MacDee, M--C-D-E-E-1-9-4-3 at yahoo

Q: Thank you, sir.

B: dot com.

Q: That was M-C-D-E-E

B: D-E-E

Q: D-E-E

B: Thank you.

Q: 1-9-4-3 at yahoo dot com.

B: Right.

Q: Thank you. Just one moment. And may I have your policy number?

B: Oh, no, I don't got it. Hold on a second.

Q: Okay. Thank you.

B: Okay. Um, R-C. Let's see R-C-9-8-4-1-4-4.

Q: And sir, are there any letters ahead of that?

B: R

Q: R-C

B: Um-hmm.

Q: 9-8-4-1-4-4.

B: 9-8-4-1-4-4.

Q: Thank you. And what day did this happen on?

B: Oh, it just loose. It's not broken or anything, it's just about to come out. It's been about a month, right around, um, the twenty first (inaudible) of last month.

Q: The twenty first of last month?

B: Yeah. It just flopping around when I'm driving down the interstate.

Q: Okay.

B: And wind is picking it up and just pushing it out. It's about to fall out. It's not broken or nothing, it's just loose.

Q: Thank you. And it is the back window?

B: Right. Um-hmm.

Q: Thank you. One moment while I pull your policy. And what year, make and model is that?

B: 1997 Dodge Dakota.

Q: Thank you. And I show your address is 5-0-7 Elliott Avenue in Columbia, South Carolina.

B: Right.

Q: Thank you. And I'm showing your agent's name is People's Choice Insurance. 8-0-3-7-3-6-0-0-4-1.

B: I got down their phone number as 4-1-9-1-1-0-3.

Q: Oh, thank you, sir.

B: John Sanders.

Q: Thank you. And it is a two door standard cab, am I correct?

B: Pardon me?

Q: Your vehicle is a two door standard cab?

B: Right. Um-hmm.

Q: Thank you. And, one moment. Give me one moment, sir. Does your back glass open or close?

B: No.

Q: No, thank you. And I am showing that you have a zero dollar deductible. Ma'am?

B: How much?

Q: Zero dollars.

B: Right. Um-hmm.

Q: And, ma'am, is this an in shop or mobile service?

A: It will be mobile.

Q: May I have your shop's telephone number?

B: (inaudible)

A: It's 8-0-3-7-7-1-7-8-7-8.

Q: And your Southern Glass and Plastics on Taylor Street in Columbia.

A: Yes, ma'am.

Q: Thank you. And one moment. I just need to know if you accept the job at the following pricing. Um, let's see. I am debating on which piece of glass it would be. It's not the windshield. Okay. NAGS list minus thirty seven percent, labor is \$41.00 hourly and \$15.00 per kit.

A: We accept the job.

Q: Thank you. Your acceptance of the job also indicates that you have accepted these rates and these prices do not include tax or the cost of molding. One moment. I am showing your shop fax number as 8-0-3-7-7-1-0-1-4-8.

A: Yes, ma'am.

Q: Okay. And the referral number is going to be 0-8-6-6-0-1.

A: 0-8-6-6-0-1.

Q: 0-8-6-6-0-1, yes, ma'am.

A: Okay.

Q: Is there anything else I can help either of you one with?

A: No, that's it.

Q: Alright. Well, thank you for calling Kemper Clear Choice Claims Services. You have a wonderful day.

A: Okay. Thank you.

Q: And good-bye.

END OF TRANSCRIPTION

Transcribed: 9-10-09

Time: 9:13

Transcribed by: jkl

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2009-CP-40-7516
	)	
	)	
	)	
Southern Glass & Plastics	)	
Company	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Kemper Casualty Insurance	)	
Company	)	
<u>Defendant)</u>		July 1, 2010
		Columbia, South Carolina

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, JUDGE.

A P P E A R A N C E S:

ROBERT L. JACKSON, ESQ.
Attorney for the Plaintiff

ASHLEY B. STRATTON, ESQ.
Attorney for the Defendant

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, there were no witnesses called.)

1 THE COURT: This is a motion for summary
2 judgment?

3 MR. JACKSON: Yes, sir.

4 THE COURT: Ready to proceed?

5 MS. STRATTON: Yes, Your Honor. My name is
6 Ashley Stratton and I represent the Defendant Kemper. I
7 work with Murphy and Grantland. John, certainly, would
8 love to be here today. He sends his regards.

9 THE COURT: I feel for you having to work with
10 Mr. Grantland.

11 MS. STRATTON: He shares some fond memories of
12 you back in Anderson.

13 Getting to the facts of this case, Plaintiff is
14 a glass repair shop for auto glass. And it performed auto
15 glass repair services for Kemper's insurers. After it
16 performed the work, it got assignments so that it would be
17 entitled to any proceeds due to the insured under the
18 insurance policy with Kemper. Plaintiff submitted
19 invoices directly to Kemper. Kemper paid what was due
20 under the policy with the insured according to the policy
21 terms. It did not pay the full amount of whatever that
22 invoice was. And now, the Plaintiff has said that they're
23 owed the full amount and there was a breach of the policy
24 terms, that Kemper did not pay the full amount.

25 Turning first to the terms of the policy. The

1 policy says that the limited liability is the amount
2 necessary to repair or replace the property with other
3 property of like, kind and quality. So that's the
4 contract that we're relying on in the insurance policy.
5 There's another contract on here, too, and it is a work
6 order that was sent from Kemper through its claims
7 administrator to the shop before they prepared the work.
8 It's an exhibit to the memo that we submitted to the
9 Court.

10 THE COURT: I haven't seen that memo. I asked
11 my clerk if there's any memoranda here.

12 MS. STRATTON: Okay. We have it. It was filed
13 June 11th. And I have a copy here for you if you like
14 that.

15 THE COURT: I see Defendant's memorandum and
16 there's an affidavit of Brad Boardman. Is that everything
17 that I need to be looking at?

18 MR. JACKSON: No, sir, I don't think you need to
19 look at any of that stuff.

20 THE COURT: Obviously, I have to look at it, so
21 I will.

22 MR. JACKSON: Do you have the Plaintiff's
23 memorandum in the file, Judge?

24 THE COURT: Let me doublecheck that, please.

25 Excuse me, I didn't mean to interrupt you.

1 MR. JACKSON: I was late -- I wasn't late
2 pursuant to the rule, but I didn't get it over here until
3 Tuesday morning early.

4 THE COURT: I don't see it, so I might get you
5 to hand me up a copy of it before you leave.

6 MR. JACKSON: Okay, sir.

7 THE COURT: Okay. There's a work order
8 submitted to Kemper.

9 MS. STRATTON: That's right. There's a work
10 order submitted that has quite a process that goes into
11 all of this. Kemper, in order to determine what the
12 amount is necessary to do this repair, it puts a lot of
13 research into it and it determines what are fair and
14 reasonable rates based on the area, based on the car and
15 the parts and everything. It reviews this research
16 multiple times a year. And any time it revises its rates,
17 it sends all the glass shops letters that say here's what
18 our new rates are. So the glass shop knows as soon as a
19 Kemper insured walks in the door, they know what they're
20 going to get paid because they have the pricing letter
21 right there.

22 THE COURT: In this particular case, did they
23 give that pricing schedule to the Plaintiff in this
24 matter?

25 MS. STRATTON: They did. And they actually

1 submitted it with their memorandum as an exhibit, the
2 pricing letter. But that's just one way they were
3 informed of the price.

4 THE COURT: Did y'all pay them pursuant to that
5 pricing --

6 MS. STRATTON: To the pricing letter, yes.
7 Another way that they're made aware of the price is
8 whenever the insured comes in, the insured in the shop,
9 get on the phone and call the claims administrator for
10 Kemper. They've got to report the claim. They've got to
11 get all the information. And the Kemper representative
12 will tell them what the price is. It says for this
13 repair, we'll pay \$386.41, will you accept this price.
14 And the shop says, yes, we will accept it. And then
15 they -- once the Kemper representative has that
16 information and they'll accept it, they fax the work
17 order. The work order, smack dab in the middle of it, it
18 has language that says performance of services constitutes
19 acceptance of the stated price. The price that you knew
20 when you got the pricing letter, when you talked on the
21 phone and now it's listed on the work order that you get.

22 THE COURT: In glass situations, do you ever
23 have a situation or scenario, for example, like in other
24 car repair matters where you have the initial evaluation
25 and you get into the work and you say it's going to be a

1 bigger cost than we anticipated, and, therefore, we need
2 an adjustment upward?

3 MS. STRATTON: Your Honor, Plaintiff would be
4 able to say more about those type situations. My
5 understanding is that it's pretty straightforward. You
6 have a Chevy Trail Blazer, you need this type of
7 windshield for it and this is what it's going to cost.
8 They all have an index that they go by called the NAGS
9 index that list all the pricing. And that's what everyone
10 follows. It's the industry standard.

11 So after they are made aware of the pricing in
12 those three different ways, they turn around and perform
13 the work. And they charge the customer, you know,
14 whatever they want to charge. It's their business, they
15 can set their own rates. Well, Kemper has said we're
16 going to pay this much because that's what's owed under
17 our policy. They pay that much and anything after that is
18 the customer's obligation to pay the difference.

19 You know, if you have surgery and your health
20 insurance pays 80 percent, then that other 20 percent is
21 up to you. So that's the situation here. Instead of the
22 shop going after the customer for the difference, the shop
23 goes oh, we'll take care of it and turns around and sues
24 the insurance company. This is happening all over the
25 state right now where multiple insurance companies are

1 being sued by the Plaintiff for situations just like this.
2 And, actually, there are cases all over the country where
3 this happens and there's a lot of litigation out there.

4 But there's one case from North Carolina, the
5 North Carolina Court of Appeals in 2008, that's referenced
6 in our memo and I have a copy of it here for you. I urge
7 you to read that case because it is exactly on point. You
8 can't find a case that has more similar facts. It's the
9 same third party administrator. It's the same work order
10 with the same language. It's just a different glass shop
11 and a different insurance company, but the exact same
12 dispute.

13 And the North Carolina court says, you know,
14 it's clear, the offer was made in the work order that
15 performance of the services constitutes acceptance of the
16 price. You accepted the price by performing the services
17 and then we paid you and you cashed the check. So you
18 accepted that price. And now you can't come back and say
19 no, I'm not bound to what that price is. You're bound by
20 a unilateral contract that you entered into.

21 THE COURT: This is Exhibit 3 to your brief
22 where it says performance of services constitutes --

23 MS. STRATTON: That's right.

24 But that North Carolina case that we reference
25 in our brief is directly on point. There's no

1 distinguishing it from this case plaintiff submitted in
2 their memorandum a couple days ago. You can't distinguish
3 it. There's nothing different. It's the authority here,
4 even though it's from North Carolina. We don't have
5 anything in our state and if we're going to follow anyone,
6 I would say it would be North Carolina. So I just urge
7 you to read that case and find here that Kemper did not
8 breach the terms of its policy. It paid the amount
9 necessary. And that the shop is bound by that unilateral
10 contract it entered into when it performed the services.

11 THE COURT: Thank you, ma'am.

12 MR. JACKSON: Thank you, sir.

13 THE COURT: Yes, sir.

14 MR. JACKSON: Ms. Stratton has stated this is
15 similar to a health insurance policy where a health
16 insurance policy paid 80 percent, the insured is then
17 responsible for the 20 percent. That's absolutely
18 correct. But the insurance policy itself states that up
19 front. That is in the policy. You know when you get the
20 policy and pay the premiums, you're going to have to pay
21 20 percent. It's stated in the document itself.

22 These auto insurance policies, however, are
23 different. The policy, as she stated, says the limited
24 liability of the amount necessary to repair or replace the
25 property with property of like, kind and quality. And

1 there's nothing there that says we're going to pay less,
2 we're going to pay more, whatever.

3 What the insurance companies are doing, they're
4 entering into an agreement with another insurance
5 company -- or another glass company, excuse me. Safe
6 Light Solutions, it's a nationwide glass repair and
7 replacement company. And they've entered into contracts
8 with Kemper, with USSA, with the insurance company in
9 North Carolina that she's referencing in her memorandum
10 and relying on in her argument to act as their third party
11 administrator for glass repair and replacement. These
12 letters that are sent out periodically are sent out by
13 Safe Light. And they're sent out by Safe Light based on
14 what Safe Light wants to pay on behalf of the insurance
15 company. Safe Light has guarantees with the insurance
16 company that this is what they're going to pay and they're
17 not going to pay any more, regardless of what the policy
18 says. The auto glass company enters into a contract with
19 its customer, the insured. That is an assignment with the
20 proceeds under the policy. If the insured, for instance,
21 paid Southern Glass and Plastics \$480 to replace the glass
22 and then sent the bill along with a claim to Kemper,
23 Kemper would send \$480 to the insured.

24 THE COURT: Say that again, please, sir.

25 MR. JACKSON: If the insured, Southern Glass's

1 customer, paid Southern Glass directly the \$480, under the
2 terms of the policy, Kemper would be required to reimburse
3 the insured \$180 -- I mean, \$480. So they would send the
4 insured the \$480. But because there is an assignment
5 between the insured and the glass replacement company,
6 Southern Glass, they somehow feel like they can interject
7 themselves, uninvited, and create a contract, a unilateral
8 contract. We maintain that there is no contract.
9 Southern Glass told Kemper on more than one occasion, we
10 don't accept your pricing letters, we don't accept the
11 fact that there is a contract and we're not going to abide
12 by it because our contract is with our customer.

13 Kemper doesn't listen. USAA doesn't listen.
14 What they're trying to do, basically, is corner the
15 market. I mean, this is a practice that's been going on
16 countrywide from here to Idaho to Washington State. In
17 this memorandum, Kemper relies heavily on two cases. One
18 is out of Idaho and one is out of the state of Washington.
19 And we submit that both of those cases are distinguishable
20 from the facts in this case.

21 The facts in the North Carolina case is true.
22 They're right on point with what we've got here. The case
23 in Washington was not, however. The insurance company in
24 that case entered into a specific written contract with
25 the insurance company to abide by a certain set of prices

1 that was sent out by the insurance company.

2 We don't have that here. What we have here is
3 Kemper, through Safe Light, trying to interject itself
4 into the contract between Southern Glass and its customer
5 and saying we've sent you this stuff and we're going to
6 put language in here that's really going to bind you down.
7 Well, Southern Glass says no, I don't agree. Under the
8 contract law that I understand in this state, as covered
9 in my memorandum, they have not accepted the terms.
10 They've rejected it in one of several ways.

11 First of all, they've told them we're not going
12 to accept your terms. Secondly, they have sent them a
13 bill that doesn't comply with the terms of the offeror.
14 Stanley Smith & Sons vs. Limestone College, 283 S.C. 430
15 at 322, S.E.2nd 474, if one of the parties does not agree
16 to all of essential terms to allege implied contract, then
17 requisite to formation of an implied contract is lacking.
18 Southern Glass has never consented to these terms. They
19 never will.

20 THE COURT: Let me ask you this. Exhibit 3 to
21 the Defendant's motion memorandum appears to be what would
22 be a work order. Is that -- it's not? I see you shaking
23 your head.

24 MR. JACKSON: Not in our opinion, Judge.

25 THE COURT: How would you describe that?

1 MR. JACKSON: What they're relying on is,
2 basically, these pricing letters that they sent out.

3 THE COURT: Let me read this right quick.

4 MR. JACKSON: It doesn't identify what kind of a
5 document it is, Judge. I know that Brad Boardman
6 classified it as a work order, but it doesn't say it's a
7 work order. It's just a printed document addressed to
8 Southern Glass for the customer, Matthew Keith. The work
9 order, basically, is generated by the glass company and
10 not by Safe Light. So, no, sir, I would not call that a
11 work order.

12 THE COURT: Well, I mean, looking at the
13 document, Exhibit 3, it says Kemper has determined that
14 the maximum amount is 453.81, less deductible, which
15 shouldn't be for glass. And then if the claim is going to
16 be more than 2500, please call. Was there any response
17 back from receipt of this saying we're not going to accept
18 the 453.81, we're going to make you pay us the full value?

19 MR. JACKSON: The response, initially, was over
20 the telephone. They contacted Safe Light over the
21 telephone, Safe Light gets in touch with the employee at
22 the glass company and says here's what we determined to be
23 a fair and reasonable price and here's what we're going to
24 pay. Southern Glass says no, we don't accept that.

25 THE COURT: Is that before or after this

1 document?

2 MR. JACKSON: Before. So what they maintain is
3 that was the first notice to Southern Glass that they
4 weren't going to pay the full amount. And this is the
5 second notice to Southern Glass that they're not going to
6 pay the full amount. And Southern Glass has told them,
7 first, we don't accept that and we're not entering into a
8 contract. There's, obviously, no meeting of the minds.

9 THE COURT: Do you have any documentation that
10 says -- other than phone calls that they contacted the
11 Defendants and said we're not going to accept that or
12 whoever their intermediary is and says we're not going to
13 accept that?

14 MR. JACKSON: We don't have anything in writing,
15 Judge, but it's contained in the -- the president of the
16 company.

17 THE COURT: Go through your lawyer please. I
18 thought you were getting ready to say something to me.

19 MR. JACKSON: Mr. Ethley, Your Honor, states in
20 his affidavit that he's notified Safe Light and other
21 companies on numerous occasions.

22 THE COURT: Okay.

23 MR. JACKSON: There's been an ongoing battle now
24 for, at least, six years, at least, with this company.
25 And what they're trying to do is push him under the

1 ground.

2 THE COURT: I understand that. And assuming
3 that is the case --

4 MR. JACKSON: The last person left standing will
5 be Safe Light Solutions. There's no consideration, Judge.
6 There has to be consideration for a contract. What is the
7 consideration? They might argue well, consideration is we
8 paid them. Well, it's not really consideration because
9 they're obligated pursuant to law to pay them. If you do
10 something pursuant to what you're already obligated to do,
11 the law is clear in this state that that is not
12 consideration.

13 THE COURT: Let's stop for a second if you don't
14 mind and let me finish reading this. I'm going to have a
15 few questions for both of you, but I want to look at this
16 further.

17 MR. JACKSON: You're reading which --

18 THE COURT: Exhibit No. 3 to the Defendant's
19 memorandum, what she described as being a work order and
20 what you say is not a work order.

21 (WHEREUPON, a pause in the proceedings.)

22 THE COURT: Go ahead. I'm sorry.

23 MR. JACKSON: This is what the pricing letter
24 says, Judge. And they're all the same, same ones they
25 sent out in Washington State, the same ones they sent out

1 in Idaho, North Carolina, Connecticut. To facilitate
2 timely payment of your invoices and avoid
3 misunderstandings, may we remind you of our inner trim
4 Kemper auto and home pricing standards. The last sentence
5 of that paragraph says, Invoices from you that are
6 accurate and not exceeding the pricing structure will be
7 paid promptly as submitted. Okay. It does not say
8 anything about invoices that don't comply with the pricing
9 list. Therefore, there is no meeting of the minds there.
10 There's no assent to agree to these prices because they're
11 billing at a higher rate. If you're going to accept an
12 offer, you've got to accept it in the exact form in which
13 the offer is made. If you don't, then there is no
14 unilateral contract. And this is attached to my
15 memorandum as a exhibit, Judge, Exhibit No. 2. And you
16 will have that available to you when I hand up my copy
17 of -- I didn't bring an extra copy and I apologize.

18 THE COURT: It may be floating around here. I'm
19 apt to lose them, so I will get it from you before you go.

20 MR. JACKSON: Here's what -- and this is rather
21 lengthy, but this is what Professor Wilson on contracts
22 says. Where an act is requested by the offeror and
23 performed by the offeree, it may be shown that the
24 performance of the act was not done with an intent to
25 indicate assent to the offer. And that's what we're

1 trying to show here today. They performed, but not in
2 response to the offer from Kemper or from Safe Light.
3 Even though the offeree knows of the offer, he may, if he
4 chooses, do the act requested and still refuse to accept
5 the offer. Thus, if the offeror offered a reward for the
6 finding of a watch, the finder may state that though he
7 returns the watch, he does not accept the offer. In other
8 words, he doesn't want the reward. If you, as the
9 offeree, makes no expressed disclaimer, it is still true
10 that the finding and return of the watch is an ambiguous
11 act which may mean assent to the offer or merely that the
12 finder is sufficiently honest to return the property
13 without desiring a reward. If, in a particular case, it
14 indicates assent to the offer, there is a contract, but it
15 may be evidence from all the facts and circumstances
16 surrounding the return of the watch that the act did not
17 mean assent to the offer, in which case, there is no
18 contract. Thus, it may be said that the offeree's outward
19 manifestations are ambiguous or unclear, particularly,
20 when they take the form of conduct. An inquiry into the
21 subsequent intent as well as into all of the other
22 circumstances surrounding the outward manifestation is
23 appropriate.

24 Here, Southern Glass manifested an intent not to
25 accept any portion of the terms offered by Kemper. And

1 again, I bring up the issue of the total lack of
2 consideration even on the unilateral contract.
3 International Shoe Company vs. Hearndons, they stand on
4 the proposition -- one of the propositions, although
5 mutuality of obligation is not an essential element in the
6 unilateral contract, a valuable consideration is
7 necessary. We have absolutely no consideration in this
8 scenario, Judge.

9 The Defendants are relying heavily on the North
10 Carolina case with the exact scenario that we have here
11 today before this Court. The State of Connecticut on the
12 same identical scenario, Auto Glass Express, Inc. vs.
13 Hanover Insurance Company -- and I have a copy of that for
14 you also, Judge, if you want it now.

15 THE COURT: I'll give you opportunity, both, to
16 make sure I have all the submissions you want me to have.

17 MR. JACKSON: In Hanover, that's 293 Connecticut
18 218, 975, Atlantic 2nd, 1266, 2009 case, Supreme Court of
19 Connecticut. In that case, the trial court found for the
20 insurance company using the same reasoning that the North
21 Carolina case uses. The glass companies appealed to the
22 Court of Appeals and then it went from the Court of
23 Appeals to the Supreme Court.

24 The Plaintiffs first claimed that the trial
25 court improperly found that their performance of repairs

1 to automobiles insured by the Defendant resulted in the
2 formation of a unilateral contract between the parties.
3 In support of their claim that the trial court acted
4 improperly, the Plaintiffs argue that the pricing letters
5 failed to convey offers by the Defendant, the Plaintiffs'
6 performance of glass repair did not constitute their
7 acceptance of any such offers, and any agreement between
8 the parties lacked consideration under the preexisting
9 duty rule. Some of the same arguments that I've made here
10 this morning.

11 In the present case, this is the Connecticut
12 Supreme Court in its opinion, the trial court found that
13 the pricing letters conveyed offers by the Defendant as
14 the offers invited acceptance, not by reciprocal promise
15 by the Plaintiffs, but by performance. And that the
16 Plaintiffs accepted the offers by their performance every
17 time they installed or repaired the glass in the
18 automobile.

19 The Court then said we agree with the trial
20 court's finding that the pricing letters conveyed to the
21 Plaintiffs' offers then invited acceptance through
22 performance. We disagree, however, that the performance
23 of glass repairs constituted acceptance of the terms set
24 forth in the pricing letters. An offer can be accepted by
25 the rendering of performance only if the offer invites

1 such an acceptance. In order to accept the offer by
2 rendering performance, the offeree must give that for
3 which the offeror bargains. It is a material -- if it is
4 in any material respect differ, there is no contract. And
5 he cites Corbin on contracts. The South Carolina case of
6 Davis vs. Orangeburg Calhoun Law Enforcement Commission
7 344 S.C. 240, 542 S.E.2nd 755 stands for the same
8 proposition. That it's got to be identical to what was
9 offered or there is no contract.

10 The court also found that the language in the
11 policy itself was ambiguous, that language being what is
12 necessary to repair or replace like kind and like quality.
13 They found that the term necessary was ambiguous.
14 Primarily, for one reason, the language I read you to
15 earlier about if you submit invoices in a timely fashion
16 that are not above what we put in our pricing letter, we
17 will pay the profit. It doesn't say what it's going to do
18 about the invoices that come in that are higher than the
19 pricing letter. So that in itself creates an ambiguity.

20 THE COURT: That's the letter you attached to
21 your memorandum?

22 MR. JACKSON: Yes, sir.

23 The word necessary, it concluded was an
24 ambiguous term. Based on New England Pipe Corporation vs.
25 Northeast Corridor, according to Webster's Third New

1 International dictionary which defines the term necessary
2 as something that cannot be done without, must be done or
3 had, absolutely required, essential, indispensable.
4 Black's Law dictionary, Sixth Edition, however, notes that
5 the term necessary also may import that which is only
6 convenient, useful, appropriate, suitable, proper or
7 conducive to the end sought. They consider this to be a
8 split of authority between Last Service vs. Progressive
9 Speciality Insurance and New England Pipe Company vs.
10 Northeast Corridor. And then it says this exemplifies a
11 reasonableness of both parties' interpretation. The
12 language of the assigned insurance policy is therefore
13 reasonably susceptible to more than one interpretation and
14 is ambiguous. It is well settled that any ambiguity is
15 resolved in favor of the insured or, in this case, in
16 favor of Southern Glass and Plastics because it is
17 (inaudible).

18 THE COURT: Let me ask, this case is -- I mean,
19 presently, the status where we are is here on Ms.
20 Stratton's motion for summary judgment?

21 MR. JACKSON: Yes, sir.

22 THE COURT: Is that correct?

23 MS. STRATTON: Yes, Your Honor.

24 THE COURT: May I ask a few questions, please?

25 Number one, Ms. Stratton, is it the contention

1 of your carrier that what it did was pay for like kind,
2 quality, value and, therefore, it met the policy terms or
3 is it their contention that we have -- we had a contract
4 with the specific Southern Glass Company by virtue of
5 Exhibit 3 attached to your memorandum?

6 MS. STRATTON: Your Honor, we counterclaimed in
7 this action for a declaration as to both of those, that we
8 abided by the terms of the policy and that they're bound
9 by the unilateral contract.

10 THE COURT: Now, you would agree with me, number
11 one, that the valuation would be, certainly, a question of
12 fact in this case?

13 MS. STRATTON: Yes. We have facts and the
14 affidavit from Brad Boardman about how they go about that
15 process. But, yeah, there's case law that says what is
16 fair and reasonable is a question of fact. We're not
17 arguing that.

18 THE COURT: From a procedure standpoint, I want
19 to make sure that I'm right. Because you didn't file a
20 motion. This is a Defendant's motion for summary
21 judgment, correct?

22 MR. JACKSON: Yes, sir.

23 THE COURT: And you're two-fold in your basis,
24 we paid like, kind and quality based on our establishment
25 of the valuation. And I'm denying your motion on that

1 basis because I think the question of value has to do --
2 to be set by the jury as a question of fact.

3 Now, the next question I have is under the
4 contract. What is the contract -- is Exhibit 3 the entire
5 contract between the parties or not?

6 MS. STRATTON: That is the document that we are
7 relying on. I think there's been some confusion because
8 he keeps citing this pricing letter, which we have sent
9 and it's notification of what the pricing is, but for --
10 when this particular insured comes in, this is the
11 contract with the insured. This is the contract saying
12 what we'll pay for this particular claim. The pricing
13 letter, you know, just notifies them in general of what
14 the change in rates have been. But it's that work order,
15 which is extremely common practice in this industry.

16 THE COURT: We all have been around. I did this
17 same kind of work when I was on your side. My
18 understanding in this case is we sent out notices to
19 everybody, this is what we're pricing. And to me, that's
20 just a notice. But in this particular case, the notice
21 sent 3/25/09 to Southern Glass in Pineville, North
22 Carolina saying that we will pay you 453.81. And then it
23 says if the cost is going to be more than 25, please,
24 call. And then, later on, it says, if you perform under
25 this, that's acceptance of the price. And my question, I

1 guess, I'm asking is there any other documentation or
2 basis to the contractual allegation that you have other
3 than Exhibit 3?

4 MS. STRATTON: Yes, Your Honor, there is. I
5 didn't have a chance to attach it to our exhibit because
6 it just came up in his response memorandum. But we do
7 have recordings of all the telephone conversations from
8 when the shop and the insured called the third party
9 administrator. I have copies of them right here. I can
10 read you --

11 THE COURT: Well, I think you need to show
12 counsel first.

13 Have you seen them?

14 MR. JACKSON: No, sir.

15 THE COURT: I'm going to take a five-minute
16 break. Procedurally, you know, you've got a fairly tough
17 standard to meet here today. I'm not saying that you're
18 correct in your analysis, but, one -- go ahead and let him
19 look at it. I'm going to go look at a couple things right
20 quick. I'll be back out to take some more.

21 Did I cut you off in your argument? If I did,
22 go ahead and I'm sorry.

23 MR. JACKSON: I just wanted to respond to your
24 question to Ms. Stratton, if I could.

25 THE COURT: Yes, sir.

1 MR. JACKSON: Here's what Brad Boardman calls
2 the document. He calls it a referral sheet. Item 7 of
3 his affidavit. After the shop agrees, here again, or
4 understands, which implies that the shop didn't agree, at
5 least it understood him because they had the telephone
6 conversation, what the rates are being paid by Kemper via
7 Safe Light on the phone, the shop received a referral
8 sheet, once again, confirming the rates Kemper will pay.
9 So that is not a work order, it is a referral sheet.

10 THE COURT: I read that.

11 I'll tell you what, let him read those. I'm
12 going to be back. I'm going to take a five-minute quick
13 break. I'm going to look over this and I'll be right back
14 and let you finish.

15 (WHEREUPON, a break was taken.)

16 THE COURT: Please be seated.

17 Has everybody had the opportunity to address the
18 issues they wanted to address to me?

19 MS. STRATTON: There were several arguments I
20 wanted to respond to that he made.

21 THE COURT: I thought you might. Go right
22 ahead, please. I'm particularly interested, let me tell
23 you, just to let you know what I'm thinking. One, I think
24 valuation is a question of fact and we're here under
25 summary judgment motion. And here again, I'm denying it

1 on that basis. I really don't want to hear much about the
2 valuation part. I am looking, particularly, as to why the
3 formation and the intent of these parties would not be a
4 question of fact at this stage. Not that you're not
5 correct, but, procedurally, why it would not be a question
6 of fact.

7 But go ahead address it, but I want you to
8 address those, too.

9 MS. STRATTON: Okay. The unilateral contract we
10 have here is pretty simple. It says performance
11 constitutes acceptance. The offeror can set those terms.
12 And what we have here is the performance. I'll argue that
13 it doesn't matter if they protest it as long as they still
14 perform. I think we've got the same situation in that
15 North Carolina case. They protest the price, but they
16 still performed it and they still cashed the checks from
17 the insurance company and they accepted the money for it.

18 Your Honor, also, we have a meeting of the
19 minds, that document, I've given to him and I can give a
20 copy to you, which I'm sorry it's come up now --

21 THE COURT: No, that's fine.

22 MR. JACKSON: Judge, I would object to the
23 introduction --

24 THE COURT: I note your objection. I'm going to
25 accept it anyway.

1 MR. JACKSON: You want to hear the grounds?

2 THE COURT: Go ahead and put them on the record.

3 MS. STRATTON: Your Honor, this is a transcribed
4 recording of the telephone conversation that goes on
5 between the third party administrator for Kemper and the
6 glass shop and the insured where they give all the claim
7 information. And then you'll see that flagged page, the
8 claim administrator gives them a price. They say okay,
9 NAGS, which is their pricing index, list minus 37 percent,
10 labor is \$41 hourly and \$15 per kit. This is all industry
11 information. And I would argue the Plaintiff understands
12 exactly what that means even if we do not.

13 THE COURT: Let me ask you that, let me stop you
14 right there. Are you looking at the last page?

15 MS. STRATTON: I'm sorry, they're not numbered.

16 THE COURT: It's the highlighted part that says
17 thank you in one moment. I just need to know if you
18 accept the job at the following pricing. I am debating on
19 which piece of glass it would be. It is not the
20 windshield -- okay. NAGS list minus 37 percent, labor 41
21 an hour and 15 per kit.

22 MS. STRATTON: Right.

23 THE COURT: Now, how do you translate that into
24 the 453.81?

25 MS. STRATTON: Well, you'll see on there, it

1 list that same thing. The list price minus 37 percent, 41
2 per hour, 15 per kit. Once -- you know, they had to
3 figure out what this part is going to be, they apply that
4 whole formula and they come to that number. This is what
5 the anticipated labor is to replace a Chevy Trail Blazer
6 windshield. This is the type part it's going to need. So
7 here's 37 percent off what that's going to be. It should
8 take you three hours to do it, so add that in, whatever
9 kit you're going to use. And they just formulate. It's
10 just a math equation and that's how they come to that
11 number.

12 But they tell them on the phone what it's going
13 to be and ask them if they accept the job. The glass shop
14 here for Kemper insured said, We accept the job. And then
15 the third party administrator says, Your acceptance of the
16 job indicates you have accepted these rates and these
17 prices. And they say, Yes, ma'am. So it seems like a
18 meeting of the minds right there to me.

19 THE COURT: Well, that's interesting that you
20 say that, but how does that equate into Exhibit No. 3 and
21 the 453.81? You may well be right, but how do I make the
22 leap from this phone conversation to 453.81? Is there
23 anything on here -- okay, WS list minus 37 percent, kit
24 \$15, \$41 per hour. I got you.

25 MS. STRATTON: And so that's how they come to

1 that number. And then it's got the offer language in
2 there. It's not the same language that's in that pricing
3 letter that he is referencing, that's not the language
4 we're relying on in this situation.

5 THE COURT: And when you say that pricing letter
6 --

7 MS. STRATTON: That's an exhibit to his
8 memorandum and that's the one that we thought was just
9 kind of sending notice when the rates were revised. They
10 sent out notice to all the glass shops to say this is what
11 our new rates are going to be.

12 THE COURT: Did you send another letter out
13 after January 24th, 2006?

14 MS. STRATTON: Yes, we sent them every time we
15 revised the rates, which can be numerous times in a year.
16 They said in their memorandum, they acknowledge that there
17 have been other ones besides that one, but that's all they
18 could produce.

19 The language in the pricing letters in that
20 Connecticut case he relied on, they're all dealing with
21 specific language that we're not relying on here. So I
22 just wanted to distinguish that whole line of reasoning.
23 And as to the consideration, he argues that there's no
24 consideration because there's a preexisting duty that
25 would pay. That is a preexisting duty under the terms of

1 the insurance policy. It's not -- which is a different
2 contract than what we have here.

3 THE COURT: I agree.

4 MS. STRATTON: So I don't think that's an issue.
5 And then this whole situation that they have with Safe
6 Light and all this litigation going on across the country
7 really has nothing to do with the exact claim that they
8 brought. They brought a claim under this --

9 THE COURT: Well, let me -- and both parties,
10 I'm really unconcerned about the attempts of your client
11 to set market prices. The valuation that y'all have
12 arrived at through whatever procedures you have is not
13 influencing my decision, that's why I've already denied
14 your motion on valuation purposes.

15 MS. STRATTON: But that's all I wanted to
16 respond to on that. And again, I would just ask you
17 before you even decide on this unilateral contract to look
18 at the North Carolina case.

19 THE COURT: I am. And I am going to base my
20 decision solely on, number one, whether there's a genuine
21 issue and material fact based on contract principles
22 alone. And that's the way I'm going to approach my
23 decision.

24 And I'll be glad to hear anything further from
25 you want me to? That's the way I think at this stage I

1 need to look at.

2 I do note for both parties that there's no
3 merger clause in this agreement. I don't know that you
4 can extrapolate the phone call into this into a contract.
5 I'm going to look at it. I'm going to look for the
6 purposes of ambiguity. I'm going to look at purposes of
7 questions of fact as I have to under this standard and let
8 you know.

9 Something else you want to point out to me?

10 MR. JACKSON: Judge, there's one case that I
11 cited in my memorandum, which you may not be able to find,
12 but I brought you a copy. I've provided a copy to Ms.
13 Stratton.

14 THE COURT: Very good.

15 MR. JACKSON: And I think this case actually --
16 the reason I couldn't find it is because it's on appeal.
17 This is out of the United States District Court for the
18 district of Minnesota. And it says it would be available
19 on West Law, but it's not available in the federal
20 supplement.

21 THE COURT: Ms. Stratton, you have this?

22 MS. STRATTON: Yes, Your Honor.

23 MR. JACKSON: This is a copy of the Connecticut
24 case. Its analysis, also, is based on the principles of
25 contract law. I believe that's all I have, Judge.

1 THE COURT: Anything further, Ms. Stratton?

2 MS. STRATTON: No, Your Honor, just point out
3 the North Carolina case for summary judgment deciding in
4 the affirmative.

5 THE COURT: I have one question for you,
6 Mr. Jackson. Earlier, you made the comment that if your
7 client's customer had come to them and gotten the work
8 done and then turned that invoice from your client into
9 the Defendant, it would have been paid at 480 or whatever
10 --

11 MR. JACKSON: Face value.

12 THE COURT: Face value.

13 MR. JACKSON: Of the invoice from Southern
14 Glass.

15 THE COURT: Do you have any evidence of that?

16 MR. JACKSON: No, sir.

17 MS. STRATTON: Just in response to that, there's
18 the reverse where if they have a walk-in or a cash
19 customer, they charge them something totally different
20 than what they would charge the insurance company.

21 MR. JACKSON: They don't know that, Judge.

22 MS. STRATTON: It's in our affidavit from Brad
23 Boardman.

24 MR. JACKSON: In response to your question,
25 Southern Glass deals with a number of insurance companies.

1 And some of those -- not all of them, but some of those
2 companies pay the full invoice as submitted by Southern
3 Glass. The ones that are in cahoots with Safe Light
4 Solutions do not because they're letting Safe Light
5 Solutions dictate what they're going to pay. And they're
6 trying to create or make it look like there's a unilateral
7 contract, when, in fact, it's just an illusion.

8 THE COURT: I've got all of that.

9 MR. JACKSON: Smokes and mirrors.

10 THE COURT: And I know you disagree. All right.
11 Thank you.

12 MR. JACKSON: Thank you, Judge.

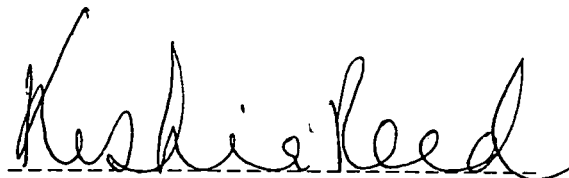
13 END OF REQUESTED TRANSCRIPT
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, Keshia Reed, Court Reporter and Notary Public in and for the State of South Carolina At Large, do hereby certify that the above-entitled cause was heard as hereinafter set out; that I was authorized to and did transcribe the said proceedings; and that the foregoing and annexed paged, numbered 1 through 34, inclusive, constitute a true and accurate transcription of my stenographic report of the said cause taken during the said hearing. In the Court of Common Pleas for Richland County, South Carolina, on the 1st day of July, 2010.

I do further certify that I am neither of kin, counsel nor interest to any party hereto. In witness whereof, I have hereunto affixed my signature this 28th day of October 2010.



Keshia Reed, Court Reporter

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-40-7516

Southern Glass & Plastics Company, Inc.,

Appellant,

v.

Kemper, A Unitrin Business,

Respondent,

FINAL BRIEF OF APPELLANT

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July 20, 2011

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL JUDGE ERR BY HIS FAILURE TO FIND THAT NO GENUINE ISSUES EXISTS AS TO ANY MATERIAL FACT AND THE DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW?
2. DID THE TRIAL JUDGE ERR IN FINDING THE EXISTENCE OF A BINDING ENFORCEABLE CONTRACT BETWEEN THE PARTIES?
3. DID THE TRIAL JUDGE ERR IN ALLOWING THE DEFENDANT TO SUBMIT COPIES OF ALLEGED TRANSCRIPTS OF TELEPHONE CONVERSATIONS?

STATEMENT OF CASE

In the course of its automobile glass repair and replacement business, Plaintiff performed automobile glass replacement services for twelve insureds of Defendant. For each repair or replacement performed, Plaintiff received from the insured an assignment of any insurance proceeds owed to the insured under his or her automobile insurance policy with Defendant.

In each instance, the Plaintiffs employee was required to report the insured's claim to the Defendant's third party administrator, Safelite Solutions which is financially affiliated with Safelite Auto Glass, a competitor of the Plaintiff, Southern Glass & Plastics Company, Inc.

Periodically, throughout the year, Safelite Solutions sends to all glass companies nationally, a pricing letter, telling the glass company what the Defendant, Kemper will pay for repair or replacement. Tr. p 72. During the course of reporting the claim, Safelite Solutions, gets Plaintiffs employee, who is not authorized to bind the company, to agree to the price Kemper will pay Plaintiff. Tr. pp 2,3, & 73. Plaintiff performs the work and submits it invoice to the Defendant for the "amount necessary to repair or replace the property with other property of like kind and quality". The Defendant refuses to pay the full amount of the invoice submitted. This is referred to as a "short pay".

Plaintiff does not immediately file an action for each short pay, because individually it is not economically feasible to do so. Instead, Plaintiff will let the short pays accumulate to the point it is economically feasible to file an action against the insurance company.

In 2009, Plaintiff filed an action in the Richland County, South Carolina, Waverly Magistrates office seeking a judgement against Kemper for 12 short pays totaling \$2,301.98. Tr. pp 6 & 7. Kemper filed its answer and numerous counterclaims alleging, among other things, that it did not owe the Plaintiff any money. Tr. p 8. Because one of Defendant's counterclaims alleged possible damages in excess of \$7,500.00 (jurisdictional limit) the magistrate transferred the case to the Court of Common Pleas for the Fifth Judicial Circuit on October 20, 2009.

Defendant's motion hearing for Summary Judgement was before Judge R. Lawton McIntosh in Richland County on July 1, 2010. Both parties submitted memorandum with supporting affidavits Tr. pp 19 & 30, and both parties presented their arguments. Tr. pp 1, 70, & 76.

By order dated August 13, 2010, Judge McIntosh signed his order granting summary judgement to the Defendant. Tr. p 1. On September 7, 2010, Plaintiff's counsel filed and served a Notice of Motion to Alter or Amend. Tr. p 15. By form order dated November 10, 2010, filed November 19, 2010, Judge Lawton denied Plaintiff's motion on December 23, 2010, Plaintiff filed and served its Notice of Appeal. Tr. p 5.

STANDARD OF REVIEW

In an action in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Townes Associates, Ltd. v. City of Greenville, 266 SC 81, 221 S.E. 2d 773 (1976), Doe v. Clark, 318 SC 274, 457 S.E. 2d 336 (1995), West v. Newberry Electric Cooperative, Inc., 357 SC 537, 593 S.E. 2d 500 (Ct. App. 2004).

The broad scope of review for actions in equity tried by a judge, master, or reference does not require the appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of witnesses. Friarsgate, Inc. v. First Federal Savings & Loan Assoc. of South Carolina, 317 SC 452, 454 S.E. 2d 901 (Ct. App. 1995); Dorchester County Department of Social Services v. Miller, 324 SC 445, 477 S.E. 2d 476 (Ct. App. 1996).

ARGUMENT I

THE TRIAL JUDGE ERRED BY HIS FAILURE TO FIND THAT NO GENUINE ISSUE EXISTS AS TO ANY MATERIAL FACT AND THE DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

The purpose of summary judgment is to determine whether or not there exists genuine issues as to any material fact. If there are no genuine issues of material fact, the moving party is entitled to summary judgment as a matter of law. Rule 56(c) SCRPC. In determining whether any triable issues in fact exists, all inferences from the facts must be viewed in the light most favorable to the party opposing the summary judgment motion. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. Hamilton v. Miller, 301 SC 45, 384 S.E. 2d 652 (1990). Additionally, if there is a mere scintilla of evidence is submitted by the moving party. Hancock v. Mid-South Mgmt. Co. Inc., 381 SC 326, 673 S.E. 2d 801 (2009); Zurich American Ins. Co. v. Tolbert, 387 SC 280, 692 S.E. 2d 523 (2010); Mura v. Nationwide Mutual Ins. Co., (Ct. App. Opinion No 4709, Heard April 13, 2010-Filed July 7, 2010).

In his remarks during the hearing, the trial judge makes reference to valuation as being a question of fact, and why the formation and intent of the parties would not be a question of fact. Tr. pp 89, 90, and 92. He also stated that he was going to base his decision solely on, number one, whether there's a genuine issue of [sic] material fact based on contract principles alone. Tr. p 97. However, nowhere in his order does he discuss factors to be considered in deciding whether or not the Defendant was entitled to summary judgment as a matter of law. Nor did he take into consideration the Affidavit of Alan S. Epley, the President and owner of Plaintiff and the Plaintiff's memorandum

provided to the court, the fact that Plaintiff disputes the Defendant's claim of a valid unilateral contract, which is more than a scintilla of evidence needed to defeat a motion for summary judgment.

ARGUMENT II

THE TRIAL JUDGE ERRED IN FINDING THE EXISTENCE OF A BINDING ENFORCEABLE CONTRACT BETWEEN THE PARTIES.

Under the common law, a trial court should submit to the jury the issue of the existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference. Small v. Springs Industries, Inc., 292 SC 481, 357 S.E. 2d 452 (1987); Kumpf v. United Telephone Co. of Carolinas, Inc., 311 SC 533, 429 S.E. 2d 869 (SC App. 1993); Prescott v. Farmers Telephone Co-Op, Inc., 328 SC 379, 491 S.E. 2d 698 (SC App. 1997). Based upon Plaintiff's memorandum, Plaintiff owner's affidavit and oral argument it is clear that the existence of a contract was in question and summary judgement should not, therefore, have been granted.

Additionally, the trial judge considering summary judgment should not make factual determinations nor consider the merits of competing testimony. David v. McLeod Regional Medical Center, 367 SC 242, 626 S.E. 2d 1 (2006); Snively v. AMISUB of South Carolina, Inc., 379 SC 386, 665 S.E. 2d 222 (SC App. 2008).

What the trial judge did was grant the Defendant's motion for summary judgment based upon the merits of the case, as he viewed them, when he should be looking to see if there is a scintilla of evidence that would provide a genuine issue of a material fact.

ARGUMENT III

THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT TO SUBMIT COPIES OF ALLEGED TRANSCRIPTS OF TELEPHONE CONVERSATIONS.

Rule 56(e) SCRCP states that "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith". During the course of her presentation, Defendant's counsel introduced a copy of a transcript of one telephone conversation between an employee of Kemper Clear Choice Claims Service and an employee of Southern Glass & Plastics. This transcript was not signed nor certified. Tr. pp 61-67. Counsel for Plaintiff objected to the introduction of this document, but the trial judge accepted it anyway. Tr. p 93.

Rule 103(a), SCRE says that "Even where the court errs in admitting or excluding evidence, the error is generally not reversible unless it denies the party a substantial right. Plaintiff contends that the right to confront a witness against it and to cross-examine that witness is a substantial right.

The consideration of this one document was the sole basis for the trial judge's ruling. It's introduction was a surprise to Plaintiff's counsel and extremely prejudicial because Plaintiff had no opportunity to refute the fact that the Southern Glass employee had no authority to bind Southern Glass to a contract of any kind, with any entity, for any purpose.

In re Sturkey, 376 SC 286, 657 S.E. 2d 465 (2008), the Commission on Lawyer Conduct allowed testimony over the objection of the Office of Disciplinary Counsel (ODC), ODC objected to the evidence because it came as a surprise and did not allow ODC the opportunity to present counter-evidence. The Supreme Court found the

Commission abused its discretion in denying a continuance because it did not allow ODC the opportunity to obtain and present evidence to rebut the surprise ...evidence.

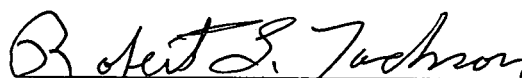
In Holly Woods Association of Residence Owners v. Hiller, (4790 SCCA, Heard March 2, 2010, Filed February 3, 2011), the Court of Appeals said that to prevent a trial from becoming a surprise or a guessing game for either party, discovery involves full and fair disclosure, Samples v. Mitchell, 329 SC 105, 113, 495 S.E. 2d 213, 217 (Ct. App. 1997) "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Id at 113-14, 495 S.E. 2d at 217. Plaintiff contends that it was severally prejudicial to Plaintiff to allow the introduction of the transcripts, particularly in view of the fact that it formed the basis for the trial judges decision.

It should also be mentioned that the Plaintiff's original complaint involved twelve insureds. The transcript that formed the basis for the trial judge's decision was but one of those insured.

CONCLUSION

Granting the Defendant's motion for summary judgment based upon the merits and upon the surprise evidence was an abuse of discretion and error as a matter of law.

RESPECTFULLY SUBMITTED

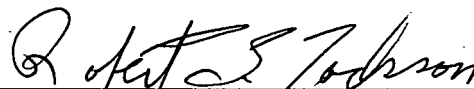


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July 20, 2011

CERTIFICATION

I certify that this Final Brief of Appellant complies with Rule 21(b) SCRAP.



Robert L. Jackson

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2009-CP-40-7516

Southern Glass & Plastics Company, Inc., ...Appellant,

v.

Kemper, A Unitrin Business, ...Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- I) Whether, when Southern Glass performed service and accepted payment from Kemper, it entered a unilateral contract with Kemper at Kemper's stated rates.
- II) Whether the trial court granted summary judgment in Kemper's favor based on the appropriate standard of review.
- III) Whether the trial court erred in considering evidence of a phone transcript detailing Southern Glass's explicit acceptance of Kemper's offer, thus forming a binding contract.
- IV) Whether there is a genuine issue as to any material fact that Kemper did not breach the terms of the insurance policy.

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. David, 367 S.C. at 250, 626 S.E.2d at 5.

STATEMENT OF THE CASE

In the course of its automobile glass repair and replacement business, Appellant Southern Glass & Plastics Company, Inc. (hereinafter "Southern Glass"), performed automobile glass replacement services for twelve insureds of Respondent Kemper, A Unitrin Business (hereinafter "Kemper"). For each replacement performed, Southern Glass received from the insured an assignment of any insurance proceeds owed to the insured under his or her automobile insurance policy with Kemper. Pursuant to these assignments, Southern Glass submitted invoices to Kemper which it claims were not paid in full. On August 20, 2009, Southern Glass filed suit in Richland County Magistrate's Court alleging the policy issued by Kemper to its insureds obligates Kemper to pay the full amount of Southern Glass's invoice and Kemper's failure to do so is a breach of the

policy terms.

Kemper filed its Amended Answer and Counterclaim on September 25, 2009, seeking a declaration that it did not breach the terms of the insurance policy which states:

LIMIT OF LIABILITY

A. Our limit of liability for loss will be the lesser of the:

1. Actual cash value of the stolen or damaged property; or
2. Amount necessary to repair or replace the property with other property of like kind and quality.

(R.p.48.) Kemper also sought a declaration that Southern Glass is bound to the rates it accepted when it entered unilateral contracts with Kemper upon performance of glass repair or replacement services for Kemper's insureds. This contract is based on language in the referral sheet sent to Southern Glass by Kemper's third-party claims administrator, detailing the rate it will pay and stating, "Performance of services irrevocably constitutes acceptance of the above price and billing instructions." (R.p.56.)

According to Brad Boardman who oversees the national glass program for automobile coverage for Kemper, Kemper processes automobile glass claims through its third-party administrator, Safelite Solutions (hereinafter "TPA"), which simplifies claim handling for Kemper, insureds and shops. (R.p.54.) Kemper reviews industry data for glass claims several times each year and determines whether rates are fair and reasonable for given areas. (Id.) When Kemper revises its rates, it notifies all network and non-network glass shops in advance of the rates it approves for glass claims. (Id.) Rates are also discussed with shops when the shop and the insured contact Kemper, via the TPA, to report the glass claim. (Id.) A customer service representative at the TPA contacts the shop of the claimant's choice to discuss rates before the shop begins working on the claimant's vehicle. (Id.) After the shop agrees to the rates given by Kemper via the TPA

over the phone, the shop receives a referral sheet confirming the rates before it begins working on the claimant's vehicle. (R.p.55.) When the glass work has been completed, Kemper pays the rate quoted to and agreed upon by the glass shop. (Id.) According to Boardman, Kemper's fair and reasonable rates are accepted/agreed to by more than 98% of all glass shops up front. (Id.) Specifically regarding all twelve invoices relevant to this matter, Kemper paid more than the lowest fair and reasonable pricing available to them for the locations and the amounts paid were all much higher than Southern Glass routinely charges customers for the same glass on a walk-in or cash type basis. (Id.)

By Order entered August 24, 2010, the trial court granted summary judgment in favor of Kemper, finding the existence of a binding, enforceable contract for the payment of Southern Glass's invoices at Kemper's stated rates. Specifically, the trial court held¹ that Southern Glass entered a valid unilateral contract with Kemper when it expressly accepted Kemper's stated rates over the telephone and through faxed referral sheets before performing the glass work without objection and accepting payment. (R.pp.3-4.) Southern Glass's motion to alter or amend was denied on November 19, 2010, and this appeal by Southern Glass followed.

ARGUMENT

I) When Southern Glass performed services and accepted payment from Kemper, it entered a unilateral contract with Kemper at Kemper's stated rates².

The trial judge correctly held that Southern Glass entered into a contract with

¹ At the summary judgment hearing, Judge McIntosh denied Kemper's first ground for summary judgment that it did not breach the terms of its policy when it paid the "[a]mount necessary to repair or replace the property with other property of like kind and quality." Denial was based on Judge McIntosh's belief that any determination of the "amount necessary" would involve a factual analysis of valuation which is inappropriate for summary judgment purposes.

² For the sake of clarity, Kemper is addressing Southern Glass's second argument regarding the validity of the contract first.

Kemper's third party administrator as an assignee of its customers' insurance claims to perform glass work for the customers at Kemper's stated rates. (R.p.2.) The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment. Hansen ex rel. Hansen v. United Services Auto. Ass'n, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct. App. 2002).

In determining Southern Glass accepted Kemper's rates and entered into binding contracts when it performed services for Kemper's insureds, the trial court relied on the North Carolina Court of Appeals' decision in CIM Insurance Corporation v. Cascade Auto Glass, Inc., 660 S.E.2d 907 (N.C. App. 2008). In CIM, an auto glass repair shop like Southern Glass brought the exact same claim as Southern Glass when it alleged that the insurance company had breached its policy by failing to pay the shop's invoices in full. Like the instant case, the insurance company in CIM handled glass claims through its third-party administrator, Safelite Solutions. The insurance company, through the TPA, communicated the prices it was willing to pay the glass shop for services rendered to its insureds. As in this case, the prices were communicated via telephone when the initial claims were made, via referral sheet or confirmation fax after claims were made but before work was performed, and via eventual payment of invoices at the quoted rate rather than at the glass shop's rate. Id. at 910. The work order in CIM stated the exact same language as the referral sheet sent from Kemper via the TPA to Southern Glass: "Performance of services ... constitutes acceptance of the above price" Id. at 909. Finally, like Southern Glass, the glass shop in CIM accepted the stated price of the insurance company by performing the services and cashing the checks it received from the insurance company. See also Cascade Auto Glass Inc. v. Progressive Cas. Ins., 145

P.3d 1253 (Wash. Ct. App. 2006) (“Cascade created binding unilateral contracts each time it repaired or replaced auto glass for Progressive insureds.”).

The North Carolina Court of Appeals affirmed summary judgment for the insurance company based on its compliance with the terms of its insurance contract, its payment to the glass shop in accordance with unilateral contracts the insurance company entered into with the glass shop, and the glass shop’s actions in cashing checks sent to it by the insurance company which constituted an accord and satisfaction of any potential claim the glass shop might assert. *Id.* Citing the “fundamental concept of contract law that the offeror is the master of his offer,” the court held that because the glass shop performed the requested repairs or replacements, it accepted the terms of the insurance company’s offers, forming valid unilateral contracts at the insurance company’s stated prices. *Id.* at 910 (citing MacEachern v. Rockwell Int. Corp., 254 S.E.2d 263 (N.C. App. 1979)). In both CIM and the instant case, the offer stated that acceptance was by performance. Because Southern Glass performed the requested repairs or replacements, it accepted the terms of Kemper’s offers, forming valid unilateral contracts at Kemper’s stated prices. *Id.*; see also Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987) (holding that performance of a specific act constitutes acceptance of the offer when the offer so provides).

The similarities between the instant case and CIM are manifest. Kemper, like the insurer in CIM, communicated its approved rates in three ways before the service was performed on the insureds’ vehicles. First, Southern Glass received periodic rate notifications and revisions from Kemper based on Kemper’s evaluation of fair and reasonable rates for the area. (R.p.54.) These rates are based on industry data for glass

claims and are reviewed several times each year. (Id.) Kemper does not dictate what the glass shops should charge a customer, but merely informs the shops of what it is paying based on the insured's policy and law. (Id.)

Second, rates are shared with insureds and shops like Southern Glass when the insured contacts Kemper, via the TPA, to report the glass claim. A customer service representative at the TPA contacts the shop of the claimant's choice during the claim call to inform them of the rates before the shop begins working on the claimant's vehicle. (Id.) Third, after the shop agrees to or understands the rates Kemper will pay, the shop receives a faxed referral sheet confirming the pre-approved cost of the repair or replacement and specifically stating: "Performance of services irrevocably constitutes acceptance of the above price and billing instructions." (R.pp.55-56.) The referral sheet confirming the rates is sent to the shop before the shop begins working on the claimant's vehicle. (R.p.55.) When the glass work has been completed, Kemper pays the claim based on the rate agreed upon by the shop before it began the work. (Id.) Kemper's fair and reasonable rates are accepted and agreed to by more than 98% of all glass shops up front. (Id.)

There is no dispute that Kemper notified Southern Glass in advance of the rates it would pay for glass repair and replacement. Upon receiving such notice, Southern Glass had three options: it could simply do the work and accept the amount Kemper had stated it would pay; it could accept the insurance payment and collect the difference from the insured; or it could refuse to perform services for Kemper insureds unless the customer paid it for the work, leaving the customer to seek reimbursement from Kemper. See, e.g., Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 115 P.3d 751 (2005) (finding

insurer fulfilled its obligations under the policy when it paid the amount it agreed in advance to pay to a glass shop who performed services for the insureds with unquestionable notice of the amount the insurer would pay).

Based on the CIM opinion which addresses identical facts, Southern Glass accepted Kemper's rates and entered into unilateral contracts when it performed services for Kemper's insureds. Notably, Kemper paid more than the lowest fair and reasonable pricing available for the invoices Southern Glass now claims were short-paid. (R.p.55.) In fact, the amounts paid by Kemper to Southern Glass were all much higher than the rates Southern Glass routinely charges customers for the same glass on a walk-in or cash basis. (Id.) Southern Glass agreed to Kemper's rates before it performed the work and accepted Kemper's rates when it accepted payment. Southern Glass cannot now escape the binding effect of the unilateral contracts it entered into with Kemper at Kemper's stated rates.

II) The trial court granted summary judgment in Kemper's favor based on the appropriate standard of review.

The trial court's decision to grant Kemper summary judgment was based solely on whether there was a genuine issue of material based on contract principles alone. (R.p.97.) Southern Glass, however, argues the trial court failed to apply the appropriate standard of review. Specifically, Southern Glass argues the trial court erred by failing to "discuss factors to be considered in deciding ... summary judgment" and failing to consider the Affidavit of Alan S. Epley and Southern Glass's memorandum in opposition to summary judgment which dispute the validity of the binding contract with Kemper. Initially, Kemper notes the absence of either rule or statutory or common law requiring trial judges to recite "factors to be considered in deciding ... summary judgment." Also,

in considering all of the arguments and submissions of the parties, the trial court applied the proper standard of review.

The trial court did not err in granting summary judgment to Kemper because Southern Glass's denial of an existence of a unilateral contract does not create a genuine issue of material fact. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) (bald allegations are insufficient to create a genuine issue of fact); see also Celotex Corp. v. Catrett, 477 U.S. 371 (1986). An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. See Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1991), *aff'd in part and rev'd in part*, 311 S.C. 218, 428 S.E.2d 700 (1993) (citing Anderson, 477 U.S. at 248). A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him. Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988).

According to the order granting summary judgment, the trial court based its ruling on three considerations. First, the trial court relied on the North Carolina Court of Appeals decision in CIM. (R.p.4.) Although counsel for Southern Glass has presented analogous case law allegedly supporting its position, he has never attempted to

distinguish CIM. In fact, at the summary judgment hearing, he stated: "The facts in the North Carolina case is [*sic*] true. They're right on point with what we've got here... The Defendants are relying heavily on the North Carolina case with the exact scenario that we have here today before this Court." (R.pp.78, 85.) Thus, there is no genuine issue of any material fact that CIM directly applies to this case.

Second, the trial court relied on the referral sheet sent to Southern Glass by the TPA on behalf of Kemper which detailed the rate and stated: "Performance of services constitutes acceptance of the above price and billing instructions." (R.p.3.) In support of its motion for summary judgment, Kemper submitted a copy of the exact work order received by Southern Glass for one of the twelve claims at issue in this case. In response, Southern Glass disputed neither the receipt of the referral sheet or the authenticity of the referral sheet. In fact, counsel for Southern Glass admitted at the hearing that "the shop received a referral sheet ... confirming the rates Kemper will pay." (R.p.92.) Thus, there is no genuine issue of any material fact that Southern Glass received the referral sheet from Kemper detailing the offer.

Third, the trial court relied on transcripts of telephone conversations between Southern Glass's representative (a shop employee), Southern Glass's customer (Kemper's insured), and Kemper's TPA wherein the glass claim was reported and express offer was made by Kemper via the TPA and accepted by Southern Glass. (R.pp.2-3.) Although counsel for Southern Glass objected to the introduction of the transcript based on evidentiary issues, he presented no evidence to dispute the transcript besides the affidavit of Alan S. Epley claiming that "[e]ach time Safelite calls to inform us of the rates, we tell the employee of Safelite that Southern Glass does not accept the

quoted rates.” (R.p.58.) Clearly, the trial court held that this bald assertion did not create a genuine issue of fact in the face of a telephone transcript detailing explicit acceptance of Kemper’s quoted price by a Southern Glass employee.

Further, whether Southern Glass informs Kemper it will not accept the rates and will not enter into a contract is immaterial. See R.p.58 (testifying Southern Glass tells the TPA that it does not accept the quoted rate over the phone and informs the TPA that no contract is created when the shop performs the work). Summary judgment was based on a determination that Southern Glass entered binding, enforceable contracts upon performance of the work. Under basic principles of contract law, a unilateral contract is entered into upon performance and is not based on any oral agreement. See, e.g. Small, 292 S.C. 481, 357 S.E.2d 452 (performance of a specific act constitutes acceptance of the offer when the offer so provides). Thus, evidence that Southern Glass orally rejected Kemper’s offer does not create an issue of fact when Southern Glass’s performance of the work indisputably constituted acceptance of the offer.

The trial judge concluded Kemper’s motion for summary judgment should be granted “[a]fter hearing able arguments of counsel [and] reviewing the pleadings and submissions of the parties,” including Southern Glass’s memorandum and supporting affidavit. (R.p.1.) After considering the submissions and arguments, the trial judge determined that Southern Glass failed to set forth specific facts showing a genuine issue of material fact. Summary judgment was properly granted in favor of Kemper and the trial judge’s order should be affirmed.

- III) The trial court did not err in considering evidence of a phone transcript detailing Southern Glass’s explicit acceptance of Kemper’s offer, thus forming a binding contract.**

Southern Glass disputes the admission of evidence including a transcript of a telephone conversation between Kemper's TPA, Southern Glass's representative (a shop employee), and Southern Glass's customer (Kemper's insured). The following excerpt from the hearing transcript illustrates the context in which the admission of the telephone transcript arose:

The Court: ...I'm asking is there any other documentation or basis to the contractual (*sp*) allegation that you have than [the referral sheet]?

Ms. Stratton: Yes, Your Honor, there is. I didn't have a chance to attach it to our exhibit because it just came up in [Southern Glass's] response memorandum. But we do have recordings of all the telephone conversations from when the shop and the insured called the third party administrator. I have copies of them right here. I can read you –

The Court: Well, I think you need to show counsel first. Have you seen them?

Mr. Jackson: No, sir.

[Court takes five-minute break]

Ms. Stratton: ... Your Honor, also, we have a meeting of the minds, that document [the transcript], I've given to him and I can give a copy to you, which I'm sorry it's come up now –

The Court: No, that's fine.

Mr. Jackson: Judge, I would object to the introduction –

The Court: I note your objection. I'm going to accept it anyway.

Mr. Jackson: You want to hear the grounds?

The Court: Go ahead and put them on the record.

(R. pp.91, 93, 94.)

Despite the Court's invitation for grounds, counsel for Southern Glass failed to say anything further until, in terms of the hearing transcript, four pages later when he

offered the judge a copy of a case he cited in his memorandum. At no point does he state the grounds for his objection. Also, by filing and serving his Memorandum in Opposition to Defendant's Motion for Summary Judgment a two days before the hearing and failing to challenge the content of the telephone calls until the hearing, counsel for Southern Glass did not afford the undersigned an opportunity to present the telephone transcripts as their relevancy was not an issue until mid-way through the hearing.

A) Southern Glass's argument that it was error to allow the submission of the telephone transcript is not preserved for review.

Southern Glass's argument that the trial court erred in allowing the admission of the telephone transcript is not properly before the Court because it was not preserved for review. "Ordinarily, a general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for appellate review." Holroyd v. Requa, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004) (appellant failed to place grounds for objection on the record); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000) (appellant simply objected, stating no grounds for objection). An objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996). A trial judge commits no error in overruling a general objection. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986).

The only exception to the requirement of Rule 103(a)(1) that an objection be stated with sufficiency is when the specific ground of the objection is apparent from the context. See, e.g., State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (Rule 103(a)(1) only requires specificity where ground for objection not apparent from

context of discussion contained in record). As stated in his brief, counsel's objection to the telephone transcript is based on the fact the transcript was not signed or certified pursuant to Rule 56(e), SCRCP. As evidenced by the hearing transcript, there is nothing apparent about the basis for the objection from the context of the hearing.

Southern Glass's objection to the transcript based on its lack of signature or certification was argued for the first time in its Initial Brief. Because Counsel for Southern Glass failed to state the specific grounds for his objection at the hearing or in the motion to alter or amend, he failed to preserve this argument for review. Therefore, the issue of whether the transcript was signed and certified is not properly before this Court.

B) Southern Glass was not prejudiced by the submission of the transcript.

Counsel for Southern Glass also claims the introduction of the telephone transcript as evidence was a surprise and was prejudicial because he had no opportunity to refute the fact that Southern Glass's employee had no authority to bind Southern Glass to a contract.

An understanding of Southern Glass's argument before the introduction of the telephone transcript reveals that there was no prejudice to its case. Specifically, until Kemper introduced the transcript proving an express offer and acceptance, Southern Glass maintained that its employees had authority to bind (or not to bind, as the case may be) Southern Glass to a contract. As represented in both the Affidavit of Alan S. Epley and at the summary judgment hearing, Southern Glass's employees allegedly rejected the contract offered by Kemper via the TPA. Mr. Epley states: "Each time Safelite [*i.e.* the TPA] calls to inform us of the rates, we tell the employee of Safelite that Southern Glass

does not accept the quoted rates.” (R.p.58.) At the hearing, Counsel for Appellant argues:

The response, initially, was over the telephone. They contacted Safe Light (sp) over the telephone, Safe Light gets in touch with the *employee at the glass company* and says here’s what we determined to be a fair and reasonable price and here’s what we’re going to pay. *Southern Glass says no, we don’t accept that.* ... So what they maintain is that was the first notice to Southern Glass that they weren’t going to pay the full amount. ... And Southern Glass has told them, first, we don’t accept that and we’re not entering into a contract.

(R. pp.80-81) (emphasis added).

Thus, before the introduction of the telephone transcript, Southern Glass clearly represented that its employees had authority to reject the offered price conveyed over the telephone. However, when presented with indisputable evidence showing the employee willingly accepted the offered price over the telephone, Southern Glass changed its tune and contradicted its prior position, claiming its employees did not have binding authority. Thus, Southern Glass was not prejudiced by the introduction of the telephone transcripts.

IV) There is no genuine issue as to any material fact that Kemper did not breach the terms of the insurance policy.

Finally, as an additional sustaining ground, Kemper asserts that it did not breach the terms of the insurance policy issued to its insureds and under which Southern Glass took an assignment. Under the plain and unambiguous terms of the policy, Southern Glass is not entitled to the full payment of its invoices by Kemper and, therefore, the order of the trial court granting summary judgment to Kemper should be affirmed. The policy of insurance issued by Kemper to its insureds and relied on by Southern Glass pursuant to Southern Glass’s assignments states:

LIMIT OF LIABILITY

- A. Our limit of liability for loss will be the lesser of the:
1. Actual cash value of the stolen or damaged property; or

2. Amount necessary to repair or replace the property with other property of like kind and quality.

(R.p.48.)

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992).

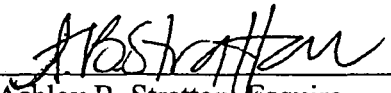
Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage. Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983). If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

There is no genuine issue of any material fact that Kemper's policy obligates it to pay the amount necessary to repair the loss. The amount paid by Kemper to Southern Glass reflects the estimated amount approved of by Kemper to repair the insureds' automobile glass. Under the plain terms of the policy, Southern Glass is entitled to no more than what Kemper has agreed to pay and has no right to further payment. See Couch on Insurance § 170.3 ("In the absence of contrary or modifying provisions in a statute, the liability of an insurer and the extent of the loss under a policy of automobile liability insurance must be determined, measured, and limited by the terms of the contract."). As the assignee under the insureds' policies, Southern Glass is bound to the terms of the insurance policy and is not entitled to the insurance proceeds claimed in this action.

CONCLUSION

For the reasons stated above, Kemper respectfully asks this Court to affirm the decision of the trial court granting summary judgment in its favor.

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July 26, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2009-CP-40-7516

Southern Glass & Plastics Company, Inc., ...Appellant,

v.

Kemper, A Unitrin Business, ...Respondent.

CERTIFICATE

I, Ashley B. Stratton, Esquire, attorney for Appellant, certify that the Brief of Appellant complies with Rule 211(b) of the South Carolina Court Rules.



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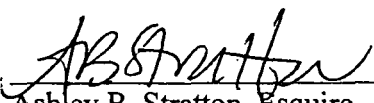
Southern Glass & Plastics Company, Inc., ...Appellant,

v.

Kemper, A Unitrin Business, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Brief of Respondent on Appellant, Southern Glass & Plastics Company, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on July 26, 2011, addressed to attorney of record, Robert L. Jackson, P.O. Box 7065, 1415 Richland Street, Columbia, SC 29202.


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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL JUDGE ERR BY HIS FAILURE TO FIND THAT NO GENUINE ISSUES EXISTS AS TO ANY MATERIAL FACT AND THE DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW?
2. DID THE TRIAL JUDGE ERR IN FINDING THE EXISTENCE OF A BINDING ENFORCEABLE CONTRACT BETWEEN THE PARTIES?
3. DID THE TRIAL JUDGE ERR IN ALLOWING THE DEFENDANT TO SUBMIT COPIES OF ALLEGED TRANSCRIPTS OF TELEPHONE CONVERSATIONS?

ARGUMENT I

THE TRIAL JUDGE ERRED BY HIS FAILURE TO FIND THAT NO GENUINE ISSUE EXISTS AS TO ANY MATERIAL FACT AND THE DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Kemper argues that the trial court did not err in granting summary judgment to Kemper because Southern Glass's denial of an existence of a unilateral contract does not create a genuine issue of material fact. Appellant does not understand this logic or the lack thereof. If Kemper says there is a unilateral contract and Southern Glass says there is not a unilateral contract, that seems to create a genuine issue of material fact.

Kemper argues that a party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Kemper and the trial judge obviously overlooked the affidavit of Alan S. Eply, the President of Plaintiff, which sets forth or points to specific facts showing that there is a genuine issue of material fact. Tr. p 58 through 59.

In Hancock v. Mid-South Management Co., Inc., 381 SC 326, 673 SE 2d 801 (SC 2009) a mere scintilla of evidence was established by deposition, a sworn statement. In Murr v. Nationwide Mutual Insurance Company, (Ct. App. Opinion No 4709, Heard April 13, 2010, Filed July 7, 2010) a mere scintilla of evidence was established by deposition, a sworn statement. In Zurich American Inc. Co. v. Tolbert, 387 SC 280, 692 SE 2d 523 (SC 2010) a mere scintilla of evidence was established by an Affidavit, a sworn statement. In this case an Affidavit (sworn statement) was provided to the trial judge and he ignored it.

Kemper next argues that the existence of a mere scintilla of evidence in support of the non-moving party's position is not sufficient to overcome a motion for summary judgment. In support of its statement it cites Dickert v. Metropolitan Life Ins. Co., 306 SC 311, 411 SE 2d 672 (Ct. App. 1991) aff'd in part and rev'd in part, 311 SC 218, 428 SE 2d 700 (1993) Citing Anderson v. Liberty Lobby, Inc. 477 US 242 (1986) Anderson is a federal case and governed by federal law. The case presently before this court is not a federal case and not governed by federal law.

Chief Justice Toal says in Hancock v. Mid-South Management Company, Inc., 381 SC 326, 673 SE 2d 801 (SC 2009):

We recognize that the court of appeals has been somewhat inconsistent on whether a mere scintilla of evidence will overcome a motion for summary judgment. This Court, however, has consistently held that where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment. Accordingly we hold that in cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence (emphasis added) in order to withstand a motion for summary judgement.

Southern Glass believes it provided more than a scintilla of evidence by way of the Affidavit of its President. Tr. p 58 through 59.

ARGUMENT II

THE TRIAL JUDGE ERRED IN FINDING THE EXISTENCE OF A BINDING ENFORCEABLE CONTRACT BETWEEN THE PARTIES.

WHEN PLAINTIFF PERFORMED SERVICE AND ACCEPTED PAYMENT FROM KEMPER, IT DID NOT ENTER INTO A UNILATERAL CONTRACT WITH KEMPER AT KEMPER'S STATED RATES.

The issue presented is a novel issue for The State of South Carolina and Kemper urges this Court to adopt the position of North Carolina in its recent decision in CIM Insurance Corporation v. Cascade Auto Glass, Inc., 660 SE 2d 907 (NC App 2008.) In support of its argument, Kemper cites two cases; one from Idaho, Cascade Auto Glass, Inc. v. Idaho Farm Bureau Insurance Co., 115 P 3d 751 (Idaho 2005), and one from Washington, Cascade Auto Glass, Inc. v. Progressive Casualty Insurance Company, 145 P 3d 1253 (Wash. Ct. App. 2006) review denied 166 P 3d 1217 (Wash. 2007).

The decision of the Idaho Supreme Court in Idaho Farm Bureau does not apply at all to this case. The Idaho court based its decision on specific language in the insurance policy that is materially and conclusively different from the language in Kemper's policies.

The limit of liability for automobile glass repair or replacement in Idaho Farm Bureau's policies read as follows:

Our limit of liability under [the comprehensive coverage in the policy governing automobile glass... is...[t]he cost of repair or replacement using parts of like kind and quality... **The cost of repair or replacement is based on the cost of repair agreed upon by us** or and estimate written based upon the prevailing competitive price. The prevailing competitive price means labor rates, parts, and material prices charged by a substantial number of repair facilities in the area where the insured vehicle is to be repaired. Id at 752 (emphasis added).

Based upon the policy language, the court held that the insurer had retained the power to unilaterally set the price it would pay for auto glass repair or replacement. Id at 754. The court said that "the policy is clear in stating that Farm Bureau will pay the amount agreed to by Farm Bureau." Id at 755.

The court recognized that this was an extreme conclusion; nevertheless it

said the conclusion was justified by extreme policy language. Cascade argued that the court's interpretation of the policy meant that Farm Bureau could set prices so low as to render its coverage entirely illusory, so low that no glass shop would accept such a payment in return for its services. The court agreed: "While it is true the terms of the policy could conceivably be read to allow Farm Bureau to agree to pay one dollar per glass claim, there are other possible causes of action or challenges which could be asserted in that instance." The court did not elaborate on what those "causes of action or challenges" might be.

In contrast, Kemper's policy reads as follows:

Our limit of liability for loss will be the lesser of the

1. Actual cash value of the stolen or damaged property; or
2. Amount necessary to repair or replace the property with other property of like kind and quality.

This language is not even close to the language in the Idaho Farm Bureau policy, "agreed upon by us." The Idaho Farm Bureau case was decided on policy language and not on some "TRICK" to create a unilateral contract.

Just as the Idaho Farm Bureau case does not avail Kemper, neither does the Progressive case. The facts of Progressive are irreconcilably different. This case's single most important fact, which undergirds the entire decision, is that Cascade and Progressive had previously entered into an express, written contract establishing the prices Progressive would pay for the services provided by Cascade. Progressive, 145 P 3d at 1254-55. In relevant part, the contract provided that "[t]his pricing agreement is solely for the purpose of insuring a fair price for work completed by [Cascade, which]... further agrees that each invoice submitted to Progressive Insurance will be billed at the rates and discounts listed

above.” Id at 1255. The contract had no set duration, but the parties agreed that it would be terminable at will. The dispute arose when Progressive entered into an agreement with Safelite to administer its glass claims. Safelite proceeded to change the pricing standards with Cascade and informed Cascade of the changes in letters which professed to supersede the terms of the prior agreement. After continuing to make repairs to vehicles insured by Progressive and being paid at the lower rates, Cascade sued Progressive for breach of the original pricing agreement.

The key difference between Progressive and this case is that the court in Progressive analyzed the pricing letters as modifications to the existing written contract rather than entirely new contracts.¹

Because the original contract was terminable at will, Washington law provided that terminable at will contracts were unilaterally modifiable. Id at 1257-58. (“Progressive can...modify its pricing terms unilaterally because the pricing agreement is terminable -at-will.”) In this case, Kemper has not alleged that Southern Glass had a pre-existing contract, terminable-at-will regarding pricing with Kemper.

The Progressive opinion is very clear that the original written contract between the parties controlled the controversy for the Washington Court. “[B]oth parties clearly intended the pricing agreement to be binding, and courts construe contracts giving

¹Although in parts of the opinion the court indicates that it considers the revised pricing letters to constitute new contracts, and in other parts treats them as modifications, the overall logic of the opinion mandates a conclusion that they are modifications, rather than new contracts.

great weight to the parties intent...Here, it is evident that both parties intended the agreed terms to satisfy all the obligations between them..." In the case presently before this court, where there is no pre-existing contract for pricing between the parties, it would be extremely unreasonable to find that letters sent by Safelite to Southern Glass manifest clear intent on the part of Southern Glass to be binding. Therefore, this Court should disregard both the Progressive and Idaho Farm Bureau cases as controlling factors in this case.

With a factual scenario almost identical to the one presently before this court, the United States Court of Appeals for the Eighth Circuit decided in favor of the auto glass company. The court stated:

Even if the blast faxes constituted offers to enter into unilateral contracts, Alpine rejected the offers when its actions failed to conform to the terms of the offer. The June 2002 fax informed the "Shop Owner/Manager" that Farmers had updated its pricing standards. The fax read, "To facilitate timely payments of invoices and avoid misunderstandings, please be sure to price all Farmers Insurance transactions in accordance with the prices indicated below." After listing the pricing structure and noting that it superseded previous pricing agreements, the document explained how to submit invoices and stated that "[b]ills that are accurate and are not more than this pricing structure will be paid promptly as submitted." Given the language of the document, mere performance of auto-glass work on the vehicles of Farmers's insureds did not constitute acceptance because the terms of the purported offer required that Alpine submit invoices in accordance with Farmers's pricing structure. There is no dispute that Alpine's invoices did not conform with Farmers's pricing structure.

Alpine Glass, Inc. v. Illinois Farmers Insurance Company, Opinion No - 1689,
Submitted: December 16, 2010, Filed June 17, 2011.

ARGUMENT III

THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT TO SUBMIT COPIES OF ALLEGED TRANSCRIPTS OF TELEPHONE CONVERSATIONS.

Kemper argues that at no point does counsel for Southern Glass state the grounds for his objection to the introduction of a transcript of a telephone conversation. The introduction of the transcript in the middle of the hearing was the first time counsel for Southern Glass knew of or had seen the transcript. Rule 103 (a) SCRE says:

In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

It should be apparent that the introduction of the transcript was a surprise to counsel for Southern Glass in view of the fact that the trial court used the transcript as the basis for his determination that a unilateral contract was created between Southern Glass and Kemper.

Secondly, when counsel for Southern Glass objected to the introduction of the transcript, the trial court interrupted counsel and said "I note your objection. I'm going to accept it anyway." Tr. pp 93 & 94. When counsel asked the trial court if he wanted to hear the grounds, the court said, "Go ahead and put them on the record." Before counsel could begin to state the grounds, he was interrupted by opposing counsel who then proceeded to move the court in another direction.

Kemper argues that Southern Glass's counsel's objection to the telephone transcript is based on the fact that the transcript was not signed or certified pursuant to Rule 56(e) SCRCP. Kemper's position is that because Southern Glass's objection to the transcript based on its lack of signature or certification was argued for the first time in its Initial Brief, the issue is not before the court.

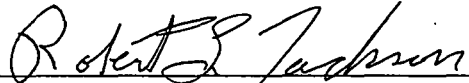
Kemper overlooks the fact that in its Motion to Alter or Amend, counsel for Southern Glass objected to the introduction of the transcript on the grounds that it had not

been presented to counsel prior to the hearing; it was a surprise to counsel and prejudiced Plaintiff's case. Tr. p 17, fn'.

CONCLUSION

Based upon arguments I, II and III, Southern Glass believes the trial court was in error in granting Kemper's Motion for Summary Judgment and should be reversed.

RESPECTFULLY SUBMITTED



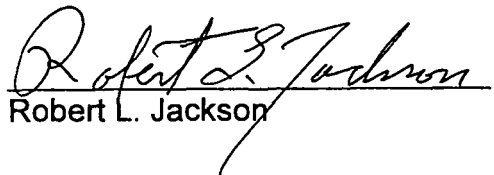
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July 20, 2011

CERTIFICATION

I hereby certify that the Reply Brief of Appellant complies with Rule 211(b)

SCRAP.



Robert L. Jackson

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Southern Glass & Plastics
Company, Inc., Appellant,

v.

Kemper, A Unitrin Business, Respondent.

Appeal From Richland County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5021
Heard May 24, 2012 – Filed August 15, 2012

AFFIRMED

Robert L. Jackson, of Columbia, for Appellant.

Ashley Berry Stratton, of Columbia, for Respondent.

KONDUROS, J.: This appeal arises from window replacement services performed for insureds of Kemper, an automobile insurance company, by Southern Glass & Plastics Company, Inc., an automobile glass repair and replacement business. Southern Glass contends the trial court erred in granting summary judgment to Kemper on Southern Glass's action to

recover additional payments, determining the parties entered into an enforceable contract. We affirm.

FACTS/PROCEDURAL HISTORY

Southern Glass performed twelve automobile glass replacements for insureds of Kemper. Southern Glass submitted invoices to Kemper, but Kemper only paid part of the amount requested for each automobile. Southern Glass brought an action in magistrate's court against Kemper for breach of contract, alleging it was owed \$2,301.98. Southern Glass contended it had submitted invoices to Kemper for replacing the auto glass in twelve vehicles but Kemper had only paid part of the amount submitted for each vehicle. Kemper filed an amended answer and counterclaim, which caused the amount in controversy to exceed \$7,500, and the case was transferred to the court of common pleas.

Kemper filed a motion for summary judgment, contending Southern Glass was not entitled to full payment because it had billed for more than the parties agreed to and thus Kemper had not breached the contract. Kemper attached to its memorandum in support of its motion for summary judgment an affidavit from Brad Boardman. Boardman stated, "I oversee the national glass program for automobile coverage for Kemper" He further stated, "Kemper handles automobile glass claims through a third-party administrator, Safelite Solutions." He also indicated, "Kemper reviews industry data for glass claims several times each year and determines whether rates are fair and reasonable for given areas." Boardman explained:

When Kemper revises its rates, it notifies network and non-network glass shops in advance of the fair and reasonable rates it approves for glass claims. Kemper does not dictate what the shops should charge a customer, Kemper merely informs the shops what it is paying based on the insured's automobile policy and law.

Additionally, Boardman's affidavit stated:

Rates are also shared with insured's [sic] and shops when the insured contacts Kemper, via Safelite, to report the glass claim. A customer service representative at Safelite contacts the shop of the claimant's choice during the claim call to inform them of the rates before the shop begins working on the claimant's vehicle.

The affidavit further stated, "After the shop agrees or understands what the rates are being paid by Kemper via Safelite on the phone, the shop receives a referral sheet once again confirming the rates Kemper will pay before [the] shop begins work on the claimant's vehicle." Boardman provided, "When the glass work has been completed, Kemper pays the claim based on the rate pre-notified and usually agreed upon by the glass shop."

Kemper also attached a document dated March 25, 2009, from Safelite Solutions addressed to Southern Glass and referencing Matthew Keefe as the customer. The document listed the following prices:

W/S LIST:	-37.0%	LABR:	\$41.00 PER HOUR
C/T LIST:	-37.0%	LABR:	\$41.00 PER HOUR
KIT:	\$15.00	2KIT:	\$30.00
H/M KIT:	\$25.00	H/M 2KIT:	\$45.00

Additionally, the document provided, "KEMPER has determined the maximum amount of such work is : \$ 483.82 [sic] less any applicable deductible amount." The document also stated, "Performance of services constitutes acceptance of the communicated price and billing instructions." Kemper attached an auto insurance policy as well. The policy stated, "Our limit of liability for loss will be the lesser of the: 1. Actual cash value of the stolen or damaged property; or 2. Amount necessary to repair or replace the property with other property of like kind and quality." The policy also stated, "We will pay . . . for loss to safety glass on 'your covered auto' without applying a deductible."

Southern Glass filed a memorandum in opposition to Kemper's motion for summary judgment and submitted an affidavit by its president, Alan S.

Epley, stating, "Each time Safelite calls to inform us of the rates, we tell the employee of Safelite that Southern Glass does not accept the quoted rates." He further stated, "I have informed Safelite on more than one occasion that no contract is created when my company does the work." Epley also provided, "I have also notified Kemper and other insurance companies, directly or through Safelite, that our only contract is with our customer, the insured[,] and the customer has assigned to Southern Glass its right to receive payment pursuant to the terms of the policy."

At the hearing on the motion, Kemper stated it had recordings of all the telephone conversations from when Southern Glass and the insured called Safelite and had brought copies to the hearing. Kemper stated it had not attached the transcripts to its memorandum as an exhibit because it did not come up until Southern Glass's response memorandum, filed two days before the hearing. The trial court took a break to give Southern Glass the opportunity to review the transcripts. After Southern Glass had reviewed the transcripts, Kemper began to address the transcripts, and Southern Glass stated, "I would object to the introduction --" The court responded, "I note your objection. I'm going to accept it anyway." Southern Glass asked, "You want to hear the grounds?" and the court responded, "Go ahead and put them on the record." However, Kemper then began describing the content of the transcripts and the objection was not discussed any further.

Kemper submitted a transcript from a recorded telephone call between an employee of Southern Glass and Safelite, as well as customer Luther McDaniel. In that conversation, Safelite stated, "I just need to know if you accept the job at the following pricing. . . . NAGS list minus thirty[-]seven percent, labor is \$41.00 hourly and \$15.00 per kit." The employee of Southern Glass stated, "We accept the job." Safelite stated, "Thank you. Your acceptance of the job also indicates that you have accepted these rates and these prices do not include tax or the cost of molding."

The trial court granted the motion for summary judgment, finding "[t]he existence of a binding enforceable contract is evidenced by transcripts of telephone conversations between [Southern Glass's] representative (a shop employee), [Southern Glass's] customer ([Kemper's] insureds), and [Kemper's] third[-]party administrator (Safelite Solutions) wherein the glass

claim was reported and express offer was made by Safelite on behalf of [Kemper]." The court determined "the telephone transcript evidences not only an express offer on behalf of [Kemper], but also an express acceptance on behalf of [Southern Glass]." The trial court found "[t]he offer was further confirmed in a fax sent by [Kemper's] third[-] party administrator to [Southern Glass] prior to the work being performed on the customer's vehicle," which "also stated: 'Performance of services constitutes acceptance of the above price and billing instructions.'" The court noted:

After [Southern Glass] verbally agreed to [Kemper's] rates over the telephone and received the work order confirming the rates, it performed the glass work without objection or further communication with [Kemper's] third[-]party administrator. Thereafter, [Southern Glass] further confirmed its acceptance of [Kemper's] rates when it accepted and negotiated checks in the amount specified by the work order.

Southern Glass filed a motion to alter or amend pursuant to Rules 52(b) and 59(e), SCRPC. In regards to the telephone transcript, Southern Glass stated in a footnote in the motion, "[Southern Glass] objected to introduction of the transcript into evidence on the grounds that it had not been presented to counsel prior to the hearing. It was a surprise to counsel and prejudiced [Southern Glass's] case." The trial court denied the motion. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRPC; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be

viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009).

LAW/ANALYSIS

I. Summary Judgment

Southern Glass argues the trial court erred in granting the motion for summary judgment because there was a genuine issue of material fact as Southern Glass disputed the existence of a unilateral contract by Epley's affidavit and its argument at the summary judgment hearing. We disagree.

"The purpose of all rules of construction is to ascertain the intention of the parties to the contract." Hansen ex rel. Hansen v. United Servs. Auto. Ass'n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct. App. 2002) (internal quotation marks omitted). "The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." Id. at 67, 565 S.E.2d at 116 (internal quotation marks omitted). When the terms of a contract are ambiguous, the question of the parties' intent must be submitted to the jury. Id. at 68, 565 S.E.2d at 116.

A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

CIM Ins. Corp. v. Cascade Auto Glass, Inc., 660 S.E.2d 907, 910 (N.C. Ct. App. 2008). The North Carolina Court of Appeals recognized, "A unilateral contract is formed when one party makes a promise and expressly or impliedly invites the other party to perform some act as a condition for making the promise binding on the promisor." Id. The court provided that GMAC communicated through Safelite the prices it was willing to pay to defendant for services rendered to its insureds. Id. The court found the prices were communicated "(1) via letter to defendant's shops, (2) via telephone when initial claims were made, (3) via confirmation fax after claims were made but before work was performed, and (4) via eventual payment of invoices at the GMAC rate rather than defendant's rate." Id. "The confirmation faxes stated, '[p]erformance of services constitutes acceptance of the above price. . . .'" Id. (alterations by court). "Although defendant protested the stated prices, these protests admitted that the confirmation faxes constituted offers-'The purpose of this letter is to address [the confirmation faxes] and to dispel any notion that we are in agreement with the offered pricing.'" Id. (alteration by court).

The court noted, "It is a fundamental concept of contract law that the offeror is the master of his offer. He is entitled to require acceptance in precise conformity with his offer before a contract is formed." Id. (internal quotations marks omitted). "Here, the offer stated that acceptance was by performance. Because defendant performed the requested repairs or replacements, it accepted the terms of GMAC's offers, forming valid unilateral contracts at GMAC's stated prices." Id. "GMAC paid defendant pursuant to the terms of the unilateral contracts entered into between the parties. Defendant has not been 'underpaid' and is due no further payments. Therefore, summary judgment was properly granted against defendant." Id.

The Idaho Supreme Court has also considered a similar issue, finding Farm Bureau Insurance Company clearly stated it would pay the amount it agreed to and it had notified Cascade, a glass company, in advance the rates it would pay for glass repair and replacement. Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 115 P.3d 751, 755 (Idaho 2005). The court found:

Id. at 68, 565 S.E.2d at 116-17 (internal quotations marks omitted). Additionally, a contract is only ambiguous when it may fairly and reasonably be understood in more than one way. Id. at 68, 565 S.E.2d at 117. "[I]n construing an insurance contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity." Id. (alteration by court) (internal quotations marks omitted).

"The necessary elements of a contract are an offer, acceptance, and valuable consideration. A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.'" Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003) (quoting Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993)). "A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance. A bilateral contract, on the other hand, exists when both parties exchange mutual promises." Id. at 405, 581 S.E.2d at 165-66 (citation omitted).

The elements for a breach of contract are the existence of the contract, its breach, and the damages caused by such breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id.

A few courts across the country have considered a similar issue to the present case. In a North Carolina case:

[T]he trial court based its judgment on three grounds: (1) GMAC[, an insurance company,] complied with the terms of its insurance contract; (2) GMAC paid defendant[, a glass company,] in accordance with unilateral contracts GMAC entered into with defendant; and (3) defendant's actions in cashing checks sent to it by GMAC, knowing that GMAC considered those payments "final," constituted an accord and satisfaction of any potential claim defendant might assert.

case, Cascade argued Safelite could not terminate the agreement between Cascade and Progressive because it was not a party to it. Id. at 1255. The court found, "Progressive presented un rebutted evidence that Safelite had authority to act as its agent in the price setting correspondence." Id. Cascade also argued, "Progressive's superseding letters were simply an attempt to unilaterally modify the terms of the pricing agreement, which Progressive could not do." Id. Cascade asserted the termination notice was deficient for two reasons: (1) "because the letters were unsigned and mass-mailed, they failed to give adequate notice to any particular glass shop that Progressive was terminating its pricing agreement" and (2) "the letters purported to unilaterally modify the terms of the pricing agreement rather than terminate the agreement altogether." Id. at 1256.

The Washington Court of Appeals found, "Progressive's superseding letters clearly signaled that it was no longer willing to pay according to the pricing agreement. Instead, Progressive offered to pay according to its new pricing standards. Cascade accepted Progressive's offer by performing glass work for Progressive's insureds." Id. at 1257-58. "A unilateral contract exists when one party offers to do a certain thing in exchange for the other's performance, and performance by the other party constitutes acceptance." Id. at 1258. The court held, "Cascade created binding unilateral contracts each time it repaired or replaced auto glass for Progressive's insureds after receiving Progressive's new offer. Progressive owes the amounts it promised to pay in the superseding letters; Cascade is entitled to no more than those amounts." Id.

The Connecticut Supreme Court has also looked at a similar situation but with differing results. Auto Glass Express, Inc. v. Hanover Ins. Co., 975 A.2d 1266 (Conn. 2009). In that case, the court found:

According to the plain language of the pricing letters, the only exchange proposed by the defendant is its promise to pay bills timely in exchange for the submission of bills that do not exceed its proposed pricing structure: "Bills that are accurate and are not more than this pricing structure will be paid promptly as submitted." In fact, the pricing letters, read as a

Cascade had one of three options available to it upon receiving Farm Bureau's notice: it could simply do the work and accept the amount Farm Bureau had stated it would pay; it could accept the insurance payment and collect the difference from the insured; or it could refuse to perform services for Farm Bureau insureds unless the customer paid it for the work, leaving the customer to seek reimbursement from Farm Bureau.

Id. The court determined, "Cascade was unquestionably on notice of the amount Farm Bureau would pay and, nevertheless, proceeded with the work, knowing there was a limit on the amount it would receive. Farm Bureau paid the amount it had agreed to pay and has fulfilled its obligations under the policy." Id. The court further found:

[T]he provisions of the insurance policy clearly provide that Farm Bureau can make a unilateral agreement about what amounts it will pay for windshield replacement or repair services. There is no issue of fact that once it made that determination, it provided notice in advance to all of the glass companies. The facts are also undisputed that Cascade accepted these Farm Bureau insured customers, agreed to provide the work, provided materials of like kind and quality, and was paid in full in the amount Farm Bureau had previously indicated it would pay. Therefore, Cascade has been paid all the money to which it was entitled under the policy and there is no breach of the insurance contract.

Id.

The Washington Court of Appeals has also considered a comparable case, which examines a somewhat different issue. Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co., 145 P.3d 1253 (Wash. Ct. App. 2006). In that

need not look beyond the pricing letters to ascertain the defendant's intent.

Id. at 1273-74 (alterations by court) (footnote and citation omitted). The court held, "In light of the clear and unambiguous language of the pricing letters, we conclude that, in order for unilateral contracts to have been formed, the plaintiffs would have been required to accept the prices stated in those letters by submitting invoices that conformed to those prices." Id. at 1274. "The plaintiffs did not submit conforming invoices, and, therefore, the trial court improperly concluded that the parties had formed a series of unilateral contracts that supplied the amounts due from the defendant under the assigned insurance policies." Id. at 1275.

The Eighth Circuit Court of Appeals has also undertaken an analysis of an analogous scenario. Alpine Glass, Inc. v. Ill. Farmers Ins. Co., 643 F.3d 659 (8th Cir. 2011). In that case, "Farmers contend[ed] that the district court erred in granting summary judgment in favor of Alpine[, a glass company,] on Farmers's breach-of-contract counterclaim. Farmers argue[d] that the price lists it faxed to Alpine constituted offers and that Alpine accepted the offers when it performed auto-glass work on behalf of Farmers's insureds." Id. at 666. The court noted, "To form a unilateral contract, Minnesota law requires a definite offer, communication of the offer, acceptance, and consideration. An offer must contain sufficiently definite terms to enable the fact-finder to interpret and apply them." Id. (footnote, citation, and internal quotation marks omitted). "Acceptance must be unequivocal and comply exactly with the requirements of the offer. 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." Id. (citation and internal quotation marks omitted).

The court found:

Even if the blast faxes constituted offers to enter into unilateral contracts, Alpine rejected the offers when its actions failed to conform to the terms of the offer. The June 2002 fax informed the "Shop Owner/Manager" that Farmers had updated its

whole, reinforce this interpretation. . . . The very first paragraph of the pricing letters sets forth the purpose of the letters, namely, "[t]o facilitate timely payment of invoices and avoid misunderstandings. . . ."

Id. at 1273 (emphases added by court).

The court determined:

[N]othing in the language of the pricing letters, either expressly or impliedly, suggests that the mere performance of glass repairs on automobiles insured by the defendant was sufficient to bind the plaintiffs to the defendant's prices. The pricing letters also do not indicate how the defendant intended to address invoices that did not conform to its pricing standards. The defendant's statement that its pricing structure represented what it believed to be "fair and reasonable prices for the market" failed to convey any intent that higher prices were unfair or unreasonable and would not be paid. Thus, we agree with the Appellate Court's observation that "[t]he [pricing] letters, therefore, do not evidence an intention on the part of the defendant not to pay a greater amount, but rather an intention not to pay a greater amount 'promptly.'" Further, the statement in the pricing letter that "[t]he prices listed [superseded] any prior pricing agreements," sheds no light on what performance was required in order to accept the defendant's new price terms. Because the plain language of the pricing letters clearly and unambiguously required the plaintiffs to submit invoices that reflected the pricing standards set forth in those letters in order to accept the defendant's offer of timely payment, and did not restrict the plaintiffs from submitting invoices reflecting higher prices, we

requirements or the additional terms set forth in Farmers's purported offer." Id.

The present case can be distinguished from the Connecticut and the Eighth Circuit cases. 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 argues that the court only considered one telephone transcript in making its decision. However, at the hearing, Kemper stated that it had transcripts for all of the conversations between Southern Glass and Safelite. Kemper read to the court one of those transcripts, and that transcript is in the record. Southern Glass made no argument at the hearing that the transcript only represented one of the claims. Further, Southern Glass put up no evidence to show it had contacted Safelite or Kemper after receiving the fax to reject the prices in it. Accordingly, because the evidence does not create a genuine issue of material fact that Kemper breached its contract with Southern Glass, the trial court did not err in granting Kemper summary judgment.

II. Introduction of the Transcript

Southern Glass argues the trial court erred in allowing Kemper to submit copies of alleged transcripts of telephone conversations as its introduction was a surprise and extremely prejudicial because it had no opportunity to refute the fact that the employee had no authority to bind the company. It also argues the transcript was not signed or certified. We disagree.

Southern Glass's memo opposing summary judgment was filed two days before the hearing, and Epley's affidavit, which is the first time Southern Glass asserted that it had informed Kemper that it rejected its pricing, was also filed two days before the hearing. The court gave Southern Glass a short

pricing standards. The fax read, "To facilitate timely payment of invoices and avoid misunderstandings, please be sure to price all Farmers Insurance transactions in accordance with the prices indicated below." After listing the pricing structure and noting that it superseded previous pricing agreements, the document explained how to submit invoices and stated that "[b]ills that are accurate and are not more than this pricing structure will be paid promptly as submitted." Given the language of the document, mere performance of auto-glass work on the vehicles of Farmers's insureds did not constitute acceptance because the terms of the purported offer required that Alpine submit invoices in accordance with Farmers's pricing structure. There is no dispute that Alpine's invoices did not conform with Farmers's pricing structure.

Id. at 666-67 (alteration by court). The court further provided:

The February 2005 fax included the same information as the June 2002 fax and went on to advise Alpine that it "may consider refusing the job if you are unwilling to provide service at the prices Farmers Insurance has offered above." The fax also provided that Alpine's rejection of the pricing terms would not "be binding on us or otherwise require us to pay you additional sums for services rendered" and that if Alpine desired to charge more than the pricing structure permitted, it "must advise our policyholders prior to initiating glass repair/replacement so that they can determine whether they are willing to pay the additional costs for your services."

Id. at 667. The court determined "mere performance of auto-glass work did not constitute acceptance, and Alpine did not comply with the pricing

time to review the documents, and Southern Glass did not request a continuance. Therefore, the trial court did not err in allowing the transcript. Additionally, a unilateral contract was created by Southern Glass's performing the work on Kemper's insureds, not by Southern Glass's verbal response. Thus, the transcript of the conversation did not prejudice Southern Glass. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Further, the argument pertaining to the transcript not being certified or signed is abandoned because Southern Glass makes only a passing reference to it in its brief and cites no case law for the argument. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

CONCLUSION

The trial court did not err in finding no genuine issue of material fact existed and granting summary judgment. Further, any admission of the transcript was not in error. Therefore, the grant of summary judgment is

AFFIRMED.

PIEPER and GEATHERS, JJ., concur.

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5021

Southern Glass & Plastics Company, Inc.,

Appellant,

v.

Kemper, A Unitrin Business,

Respondent,

PETITION FOR REHEARING

Robert L. Jackson, Esquire
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Attorney for Appellant

Ashley B. Stratton
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August 24, 2012

The Appellant Petitions the three judge panel in the captioned case to rehear the issues on appeal that were decided by Opinion No. 5021, Filed August 15, 2012.

Appellant contends that the panel misapprehended the following:

1. This was an appeal from a Motion for Summary Judgement. In order to withstand a motion for summary judgment, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Management Co. Inc.*, 381 SC 326, 673 2d 801 (SC 2009). In *Hancock* the mere scintilla of evidence was sworn deposition. In *Zurick American Insurance Company v. Tolbert*, 387 SC 280, 692 SE 2d 523 (SC 2010), the mere scintilla of evidence was a sworn Affidavit. In the case before this Court the mere scintilla of evidence is a sworn Affidavit.

Nowhere in his order does the trial judge discuss the factors to be considered in deciding whether or not the Defendant was entitled to summary judgment as a matter of law, nor does he use the term "mere scintilla of evidence".

Additionally, nowhere in its opinion does this court discuss the factors to be considered in deciding whether or not the Defendant was entitled to summary judgment as a matter of law, nor does the court use the term "mere scintilla of evidence". This Court did discuss the fact that Southern Glass submitted an affidavit by its president, Alan S. Epley wherein, he refuted that a binding unilateral contract existed. Appellant contends that this was a scintilla of evidence sufficient to overcome a motion for summary judgment. See *Zurick*, supra. (Affidavit).

2. This Court refutes Petitioners argument that the trial judge erred by allowing the introduction of documents that were submitted for the first time at the hearing for summary judgment over the objection of counsel. In its opinion this court said:

Southern Glass's memo opposing summary judgment was filed two days before the hearing, and Epley's affidavit, which is the first time Southern Glass asserted that it had informed Kemper that it rejected its pricing, was also filed two days before the hearing. The court gave Southern Glass a short time to review the documents, and Southern Glass did not request a continuance. Therefore, the trial court did not err in allowing the transcript.

Rule 56 Summary Judgment (c) Motions and Proceedings Theory, SCRCP, says:

The motions shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing.

It appears to Petitioner that it is being penalized even though it complied with the Rules of Civil Procedure.

This Courts says that "The Court gave Southern Glass a short time to review the documents, and Southern Glass did not request a continuance". Southern Glass did object to the introduction of the transcripts, but the objection was overruled. Tr. P93. Petitioner contends that if the moving party does not comply with the rules of civil procedure, the transcripts should have been excluded.

This court says "Further, the argument pertaining to the transcript not being certified or signed is abandoned because Southern Glass makes only a passing reference to it in its brief and sites no case law for the argument". Appellant contends that a passing reference is all that should be necessary to bring the matter to the court's attention. In response to this Court's statement that Southern Glass cites no case law for the argument

the Petitioner states that the transcript not being certified or signed is a statement of fact and not a proposition of law and, therefore a cite in support of a statement of fact is not necessary.

Additionally, Petitioner brings this Court's attention to the first sentence of Petitioner's Appellant's brief, page 7. Rule 56(e) SCRPC states that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith". If the proposition is covered by a rule of procedure, that should be sufficient.

3. This Court made factual determinations and considered the merits of competing testimony instead of making a determination as to whether or not a scintilla of evidence existed that created a genuine issue of material fact for a jury to determine. See *David v. McLeod Regional Medical Center*, 367 SC 242, 626 SE 2d 1 (2006) and *Snaveley v. Amisub of South Carolina, Inc.* 379 SC 386, 665 SE 2d 222 (SC App 2008).

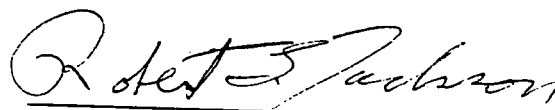
4. The CONCLUSION of this Court's opinion says "The trial court did not err in finding no genuine issue of material fact existed and granting summary judgement." The trial court made a finding that a binding unilateral contract was formed between Southern Glass and Kemper. Nowhere in the trial court's order can the Petitioner find any mention of "a scintilla of evidence" or "no genuine issue of material fact existed".

CONCLUSION

Petitioner respectfully requests this Court reconsider its position regarding 1) what is necessary to overcome a Motion for Summary Judgment and 2) The propriety of the trial judge considering a Motion for Summary Judgment making a factual determination and consider the merits of the case.

The Petitioner is available for additional oral argument if this Court deems it necessary or appropriate.

RESPECTFULLY SUBMITTED

A handwritten signature in cursive script, reading "Robert L. Jackson". The signature is written in dark ink and is positioned above a horizontal line.

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August 24, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC Court of Appeals

SEP 05 2012

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APPEAL FROM RICHLAND COUNTY SEP 05 2012
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge S.C. Supreme Court

Case No.: 2009-CP-40-7516

Southern Glass & Plastics Company, Inc., ...Appellant,

v.

Kemper, A Unitrin Business, ...Respondent.

RETURN TO PETITION FOR REHEARING

Respondent, Kemper, A Unitrin Business, (hereinafter "Kemper"), respectfully requests the denial of Appellant Southern Glass & Plastics Company, Inc.'s (hereinafter "Southern Glass") Petition for Rehearing. The basis for the denial is set forth below.

D) The trial court granted summary judgment in Kemper's favor based on the appropriate standard of review.

Southern Glass's arguments (1), (3) and (4) concerning the standard of review applied by the Court in affirming summary judgment in Kemper's favor simply restate arguments presented by Southern Glass in the Briefs and oral argument before this Court. A petition for rehearing must show points supposedly overlooked or misapprehended by the court. Checker Yellow Cab Co., Inc. v. Checker Cab & Parcel Serv., Inc., 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986). Its purpose is not to present points the lawyers of losing parties overlooked themselves or to have the case tried in the Court of

Appeals a second time. Id. (citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933)). To the extent Southern Glass's arguments mirror prior arguments and attempt to have the case tried a second time, Kemper maintains such arguments should not be considered.

To the extent the arguments might present points supposedly overlooked or misapprehended by the Court, Kemper reiterates arguments presented in its Brief and oral argument. Namely, there is no rule or statutory or common law requiring trial judges or appellate court judges to recite factors to be considered in deciding summary judgment.

Further, affirming summary judgment in Kemper's favor is proper because Southern Glass's denial of an existence of a unilateral contract does not create a genuine issue of material fact. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) (bald allegations are insufficient to create a genuine issue of fact); see also Celotex Corp. v. Catrett, 477 U.S. 371 (1986). An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him. Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988). The bald allegation in Alan Epley's Affidavit that Southern Glass did not enter into a unilateral contract with Kemper is insufficient to create a genuine issue of fact.

A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment. Hansen ex rel. Hansen v. United Services Auto. Ass'n, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct. App. 2002). This Court determined Southern Glass entered into a unilateral contract with Kemper as a matter of law. The appropriate standard was applied as there was not even a scintilla of evidence to create an issue of fact. Therefore, Southern Glass's Petition for Rehearing should be denied.

II) The trial court did not err in considering evidence of a phone transcript detailing Southern Glass's explicit acceptance of Kemper's offer, thus forming a binding contract.

As noted in this Court's Order affirming summary judgment and in Kemper's Brief and oral argument, there are three reasons why admission of the phone transcript at the hearing was proper. First, Southern Glass failed to present the argument that the transcript was inadmissible because it was not signed or certified until its Initial Brief. Issues not raised to and ruled upon by the trial court will not be considered on appeal. Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 598 S.E.2d 712 (2004). Therefore, Southern Glass failed to preserve this argument for review.

Second, the argument that the transcript was not signed or certified was correctly deemed abandoned because it was a short, conclusory statement made without supporting authority. Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct.App.2001) ("Short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). When given the opportunity to explain the grounds for his objection to the introduction of the transcript, counsel for Southern Glass failed to state the grounds for the objection and failed to request a continuance.

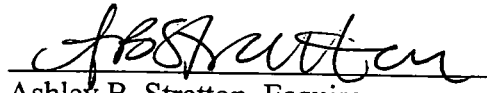
Third, Southern Glass was not prejudiced by the introduction of the transcript. The transcript has no bearing on the finding of a binding unilateral contract because the contract was entered into by performance and not by a telephone conversation. Also, Southern Glass attempted to make the transcripts an issue when it referenced the telephone conversations in Alan Epley's Affidavit. The transcript did not become an issue until Southern Glass made it an issue. There is no reason why Southern Glass would have been surprised by a transcript at the hearing when Southern Glass is the party who brought up the telephone conversations in the first place.

CONCLUSION

For the reasons stated above and further supported in Kemper's Brief and at oral argument, Kemper respectfully requests the denial of Southern Glass's Petition for Rehearing.

[Signature on following page]

MURPHY & GRANTLAND, P.A.

A handwritten signature in cursive script, appearing to read "Ashley B. Stratton", written over a horizontal line.

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Attorney for the Respondent

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September 5, 2012

The South Carolina Court of Appeals

Southern Glass & Plastics Company, Inc., Appellant,

v.

Kemper, A Unitrin Business, Respondent.

Appellate Case No. 2010-181386

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Daniel G. Pieper

J.

U. Ke

J.

John O. Smith

J.

Columbia, South Carolina

cc:

Robert L. Jackson
Ashley Berry Stratton
R. Lawton McIntosh

FILED

20 September 2012