THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-1787

Grange Mutual Casualty and Trustguard Insurance Company,.....Respondents,

v.

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

PETITION FOR REHEARING

January 15, 2020

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TABLE OF AUTHORITIES

Cases

Statutes

Secondary Authorities

INTRODUCTION

Appellant 20/20 Auto Glass, LLC, hereby respectfully requests that the Court of Appeals reconsider its unpublished decision in this case, affirming the ruling of the Anderson County Circuit Court. While the opinion identifies several cases upon which the affirmance is based, there is no factual analysis showing how the cases apply to the stipulated facts in the record. Indeed, an analysis of the facts stipulated to by the parties show that the cases require the trial court's determination be reversed. As a consequence, the decision issued in this case is erroneous and should be reconsidered.

1. The facts establish that there was an insufficient offer and no intent to be bound

The decision properly identifies the standard of review as applicable to decisions below predicated on stipulated facts. The error in the opinion is failing to apply that standard. The stipulated facts show that 20/20 rejected Grange's offers on pricing, both verbally and in writing. These facts are critical to determining whether a unilateral contract was formed by subsequent performance. Restatement (Second) of Contracts §§53(2) and (3). For there to be an enforceable contract, "there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) *citing Hughes v. Edwards*, 265 S.C. 109, 220 S.E.2d 231 (1975). The Court's opinion fails to address the stipulated facts

that compel the conclusion that there was absolutely no meeting of the minds for payment of 20/20's work.

Moreover, the undisputed, stipulated evidence shows that the "offers" made by Grange were, on their face, not intended to be binding. First, the documents contained two different provisions indicating that the amounts charged could exceed the amounts in the documents. Those provisions demonstrate that the pricing identified in the documents was not intended to create a unilateral contract upon performance. Second, Grange's payments once 20/20's non-conforming invoices were submitted showed that Grange did not intend for its prior communications to be binding because the payments were all for amounts different that the amounts supposedly offered. The exhibits and stipulated facts go to Grange's intent, not 20/20's. The evidence establishes that, at the time of the communication and at the time the work was performed, billed and paid, neither party intended to be bound by the pricing terms communicated by Grange. The effort to make them binding was purely a lawyer construct, made well after the fact. That does not create a contract in South Carolina and this Court's opinion affirming a decision to the contrary is manifest error and should be reconsidered.

2. The opinion fails to address the facts that establish a failure of consideration

Although the Court's decision cites the appropriate authorities establishing the necessity of consideration for the formation of a contract, it fails to identify a

single fact that would merit the conclusion that consideration is present in the claims at issue. Indeed, the Court correctly notes that performance of a task that one is legally obligated to perform is not consideration that would support the existence of a contract. Here, the stipulated facts and the analysis of applicable cases establish that there was no legitimate consideration supporting Grange's assertion that contracts were formed when 20/20 performed work for Grange insureds.

Significantly, the Court's decision fails to address the impact of the Supreme Court's decision in *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013). The Supreme Court's decision clarifies that, regarding property insurance claims like these here, once the loss has occurred, the policyholder has a vested claim and can freely assign that claim. *Id.* at 344, 745 S.E.2d at 94. Grange owes a debt to each policyholder when the policyholder's automobile glass is damaged. The amount of that debt is defined by the contract – the insurance policy – between Grange and the policyholder. The policyholder is then free to transfer that debt "like any other chose in action or piece of property." *Id.* Grange is legally obligated to pay that debt.

Three possible outcomes arise when 20/20 submits its invoice to Grange for 20/20's replacement services: (1) Grange pays exactly what its policy obligates it to pay; (2) Grange pays less than what its policy obligates it to pay; or (3) Grange

pays more than what its policy obligates it to pay. Only the third possible outcome would form a basis for consideration for its unilateral contract theory. Paying exactly what its contract requires is nothing more than what it is legally obligated to do and thus cannot be consideration. Similarly, paying less than what it is obligated to pay is not consideration but rather a breach of its insurance contract. As a result, given the valid assignments of the insurance proceeds made by the policyholders, there cannot be consideration for the alleged unilateral contracts. The Court's failure to apply the facts to the cited cases requires reconsideration.

3. South Carolina Code §38-57-75 precludes the creation of a unilateral contract.

The Court's decision further fails to properly apply South Carolina Code § 38-57-75 to the unilateral contract analysis. Section 38-57-75(E)(1) provides that if the glass shop refuses to accept the insurer's proposed reimbursement rate, the policyholder may be informed that the policyholder "will be responsible for additional costs." This is significant with respect to this case for two reasons: one, it provides 20/20 with the statutory ability to reject Grange's proposed pricing; two, it establishes that 20/20 cannot be bound by those prices through some other means because the policyholder may be responsible for additional charges. If Grange had the ability to bind 20/20 to its pricing, the policyholder would never be responsible for some additional amounts. Critically, the alleged "offers" do not purport to limit themselves to what Grange will reimburse but rather attempt to

place a limit on what 20/20 will charge. If the offers could create binding contracts upon 20/20's performance of the work, 20/20 would be foreclosed from pursuing anyone for additional amounts beyond what Grange promised to pay. That, however, was not Grange's position at the time the claims were being made and the work was being performed. As the stipulated facts show, Grange informed the policyholders that they could be charged some amount if 20/20 refused to accept Grange's pricing. Those communications plainly show that Grange's "offers" were not intended to bind 20/20 to Grange's pricing.

The statute, combined with *Narruhn*, creates a circumstance whereby this Court's decision in *Southern Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (S.C. App. 2012), is neither controlling nor persuasive regarding whether unilateral contracts were formed in this case, based on the stipulated facts presented. This Court's failure to analyze the impact of the statute on the trial court's conclusion that a unilateral contract existed requires reconsideration.

CONCLUSION

The Court's decision affirming the trial court is at odds with the stipulated facts and contrary to the applicable law, both cases and the South Carolina Code. As a result, 20/20 respectfully requests that the Court reconsider its December 31, 2019, decision in this case.

Respectfully submitted,

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v.

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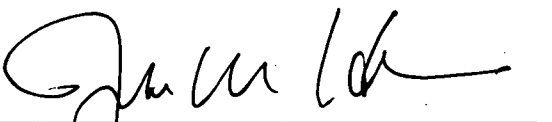
PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Respondents Grange Mutual Casualty and Trustgard Insuarance Company by depositing a copy of it in the United States Mail, postage prepaid, on January 15, 2020, addressed to their attorneys of record, Wesley B. Sawyer, Esq., P.O. Box 6648, Columbia, SC 29260.

January 15, 2020



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January 15, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Grange Mutual Casualty and Trustgard Insurance Co. vs. 20/20 Auto Glass, LLC
Appellate Case No.: 2017-000259

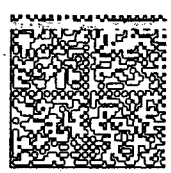
Dear Ms. Kitchings:

Please find enclosed the Appellant's Petition for Rehearing in the above-captioned matter.

Very truly yours,

Joshua M. Henderson
FOR: HENDERSON, BRANDT & VIETH, P.A.
JMH/loy
Enclosure

cc: Wesley B. Sawyer, Esq.
Chuck Lloyd, Esq.
Matt Bailey



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