THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2020-000462

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

v.

20/20 Auto Glass, LLC.....Petitioner.

PETITIONER'S REPLY IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

May 28, 2020

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TABLE OF CONTENTS

The case before the Court requires review because (a) the decisions below ignore a statute that directly contradicts the outcome of the case; (2) the courts below acted contrary to a decision of this Court that is dispositive of issues raised.

1. *Southern Glass & Plastics v. Kemper,* decided in 2012, is no longer good law in light of this Court's subsequent decision in *Narruhn v. Alexa London Ltd.* and the subsequent enactment of S.C. Code 38-57-75.

The validity of the decisions below turns entirely on the continued vitality of the court of appeals' decision in *Southern Glass & Plastics v. Kemper*, 399 S.C.483, 732 S.E.2d 205 (S.C. App. 2012). It was the cornerstone of the trial court's decision here and it is what Grange argues throughout its opposition to 20/20's petition now. If subsequent events - specifically, an opinion issued by this Court and the adoption of a statute by the South Carolina Legislature - served to cabin the court of appeals' reasoning in *Southern Glass*, then it is incumbent upon this Court to review whether those subsequent events are outcome determinative. While the opinion in *Southern Glass* was suspect from its origins, this Court and the legislature have rendered it meaningless. As a result, review by this Court is necessary to clarify the state of the law in South Carolina given the existing conflicts between the court of appeals on one side and this Court and the legislature on the other.

There is no dispute that an actual written contract exists here: the insurance policy between Grange and its policyholders, 20/20's customers. That contract provides to the policyholder coverage if the policyholder's automobile glass breaks. And, because this is property damage insurance, Grange owes its policyholder a debt as soon as the damage occurs. The amount of the debt is defined by the contract's terms: the lesser of the actual

cash value of the vehicle or the amount necessary to repair or replace the damage glass. (R. pp. 91-92, 133; Stipulation of Facts ¶10, Exhibit A). There is no dispute at all that for each of the disputed claims at issue here, Grange owed its policyholder for the policyholder's damaged automobile glass and that that debt pre-existed the offer of unilateral contract, assuming any such "offer" was ever made.

The existence of that debt, of Grange's obligation to its policyholder, is why *Narruhn v. Alexa London Ltd*, 404 S.C. 337, 745 S.E.2d 90 (S.C. 2013) and S.C. Code 38-57-75, is dispositive of Grange's unilateral contract claims. In its dealings with 20/20, Grange was not operating on a blank slate when it was making its "offers" to 20/20. First, Grange had no ability to prevent 20/20 from rejecting Grange's proposed pricing given that the legislature codified 20/20's ability to reject that pricing. The statute specifically states, "If the provider refuses to accept the rate...." 38-57-75(E)(1). It also provides, twice, the policyholder has the right to use any provider it wants to perform the glass replacement service. 38-57-75(A) and (E)(2). Read in totality, the statute thus prohibits the insurer, or its third-party administrator, from creating a situation whereby the provider is unable to perform the work without rejecting the proposed pricing. That is absolutely at odds with the holding in *Southern Glass* and thus contrary to Grange's position here and the decisions of the courts below.

The statute conflicts with the unilateral contract theory on a second ground. If a unilateral contract could be created on these facts, that 20/20 agreed to be bound by Grange's proposed pricing for its work notwithstanding its stated objection to that pricing, then there could be no circumstance under which the policyholder would have

any additional liability for any additional charge. Either a contract exists which binds 20/20 to the contract's terms making payment by Grange the fulfillment of the agreement and the end of the issue or it does not, which, under the statute, would permit 20/20 to pursue the customer for additional sums beyond what Grange paid. It necessarily cannot be both. Consequently, the statute nullifies Grange's ability to create unilateral contracts, even if all of the elements of a unilateral contract were present.

On top of the statutory problem is the issue of the impact of this Court's decision in *Narruhn*. In that case, this Court favorably cited a long line of authority standing for the proposition that an insurer cannot prevent the assignment of the proceeds of an insurance claim after the loss has occurred. *Narruhn*, 404 S.C. at 344-45, 745 S.E.2d at 94. Given the ability of a policyholder to assign the proceeds owed for the damaged automobile glass, 20/20 had the ability to seek the entirety of the insurance proceeds owed by Grange, not merely the amount Grange offered.

In an effort to avoid the application of fact that assignments of the debt it owed prevents the enforcement of its unilateral contract theory, Grange makes a tortured consideration argument in its return in opposition to 20/20's petition. Grange's Return in Opposition at 19, n. 8. The consideration for the assignment has absolutely nothing to do with avoiding out-of-pocket expenses after Grange makes its payment for the replacement services. Rather, the consideration for the assignment is the performance of the work. 20/20 agrees to replace the customer's windshield in exchange for the customer paying for 20/20's services by assigning to 20/20 the insurance proceeds owed by Grange. That payment, the assignment of the debt, is no different than if the customer

wrote 20/20 a check, a negotiable instrument that assigns to 20/20 that amount of the customer's money held by the customer's bank. As a result of the assignment, 20/20 steps into the shoes of the policyholder and is now subject to the defenses that Grange could assert *against the policyholder*. *Bac Home Loan Serv. L.P. v. Kinder*, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (S.C. 2012); *Dixie Wood Preserving Co. v. Albert Gersten & Associates*, 244 S.C. 57, 64-65, 135 S.E.2d 368, 371 (S.C. 1964).

The legal consequence of the assignment is critical to the outcome of this case. Assume, for the moment, that instead of being paid by its customer with the assignment of the customer's insurance proceeds, 20/20 had received cash from the customer in the full amount of 20/20's invoice. The customer then submitted a claim to Grange with her paid receipt from 20/20. Grange would have to adjust that claim based upon the terms of the insurance policy; it could not rely on a supposed unilateral contract with 20/20 to which the customer/policyholder is a total stranger. With the assignment, 20/20 steps into the shoes of the policyholder and is therefore entitled to collect the debt without regard to the supposed unilateral contract offer.

The situation that Grange is attempting to create is no different from a debtor who sends a letter to a neighborhood kid who mows lawns stating that if the kid mows the neighbor's lawn, the debtor will pay the kid $10 and that by mowing the lawn, the kid agrees to the deal. The kid talks to the neighbor and the neighbor offers the kid an IOU from the debtor for $40. The kid agrees to accept the IOU in exchange for mowing the lawn and then in fact mows the lawn. The debtor has in no way successfully reduced his debt by sending the earlier letter. The kid could accept the $10 and call it good but is

certainly entitled to collect the full amount of the IOU. Similarly, the neighbor could have paid the kid $40 in cash and collected the full amount of the IOU without the debtor being able to claim that he had a contract with the kid and now only owes $10 on the debt. That effort by Grange is contrary to both the law and the public policy of South Carolina and yet it was adopted and endorsed by the courts below.

Grange further argues that *Narruhn* has no application here because the Court's opinion addressing the validity of post-loss assignments of insurance proceeds was merely dictum. To the extent the Court accepts Grange's characterization of that analysis, it simply creates a greater basis for the Court to grant review here to clarify the law as it relates to the validity and impact of post-loss assignments. *Narruhn* clearly indicates that insurers may not restrict post-lost assignments of insurance proceeds owed by the insurers for covered claims. Grange, attempts to avoid that prohibition by claiming it created a separate contract that defeats the assignment. Rather than permit insurers like Grange to ignore *Narruhn* by contending it is only dictum and not binding on courts or parties, this Court should grant review and determine whether the reasoning in *Narruhn* applies or not.

Nothing in Grange's unilateral contract theory applies to the policyholders here. Instead, Grange asserts the existence of unilateral contracts to avoid its obligations under the policy. That is why the failure of the courts below to address the assignments requires this Court to review those decisions.

The changes in the statute and the changes in the jurisprudence since the court of appeals decision in *Southern Glass* necessitates that this Court exercise its discretion to

review the decision below in this case. Allowing the decisions below to stand without the benefit of this Court's analysis leaves the law in this area in an unresolved state of conflict.

2. No unilateral contract was created on these facts.

There could be no unilateral contract in this instance because the "offer" was such that Grange never intended to be bound by the pricing communicated. Grange ignores everything about the "offers" except for the single sentence: "Performance of services constitutes acceptance of the communicated price and billing instructions." (R. pp. 147, 160, 168). Grange ignores completely the pricing equivocation in the document, such as the statement that if the cost exceeded $1,000, 20/20 was to contact the third-party administrator for approval of the price. The same document states "GRANGE INSURANCE has determined the amount of such work is: $248.00 less any applicable deductible amount." R. p. 160. Read as a whole rather than looking at only one sentence in the document, the document provides that if the provider's price exceeded $248 but was less than $1,000, no approval was necessary. Had there been a definitive pricing offer made by Grange, there would have been a need to seek approval of a price variation, no matter the amount. At a minimum, it was not a definitive offer. Similarly, the document provides for 20/20 to contact the third-party administrator for approval of "other charges," acknowledging the prospect that the "offer" did not cover the full cost of the replacement. That is not an offer of sufficient specificity to create a unilateral contract. "To be binding, an offer must be definite." *Prescott v. Farmers Telephone Co-op, Inc.*, 335 S.C. 330, 336-37, 516 S.E.2d 923 (S.C. 1999).

When the statement that Grange relies upon as disposing of 20/20's claim against it is put into context, it seems doubtful that there was any offer made at all. Here is the entire paragraph from the referral sheet that contains the identified sentence:

> 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.

(R. pp. 147, 160, 168). Which communicated price and billing instructions does that sentence refer, the pricing communicated in the fax or the pricing communicated during the call with Safelite in the circumstances laid out in the paragraph? That is hardly the picture of a definite offer.

Grange also ignores the undisputed fact that it failed to pay the amounts in the faxed "offers" in every one of the claims that underlie this case. (*See, e.g.*, R. pp. 98-99, Stipulation of Facts ¶49 (amount offered $279.68) and ¶ 57 (amount paid $290.53), p. 101, Stipulation of Facts ¶ 66 (amount offered $248.00) ¶ 71 (amount paid $302.21) Grange contends in its return that payment constitutes one of the four ways pricing is communicated. Grange's Return in Opposition at 12-13. What Grange repeatedly communicated with its payments to 20/20 is that the pricing contained in the fax confirmations was irrelevant. Had Grange intended the fax referral sheets to be offers to enter into contracts, surely it would have then paid the amounts offered, not some other amount that had no relationship to the amounts in the faxes. Grange failing to pay the amounts stated in the faxes makes the faxes something other than offers and something more along the lines of communications that do not give rise to a contract of any kind.

3. There was no consideration for the alleged unilateral contract.

Even unilateral contracts require consideration to be valid and enforceable. The failure of consideration here is fatal to Grange's position and demonstrates the manifest error of the decisions below.

Grange's analysis of the consideration issue is flatly wrong. It goes to great lengths mischaracterizing the relationships and the transactions at issue in an effort to convince the Court that no error below occurred. A proper accounting of those relationships and transactions shows exactly why there was no consideration here.

There are three relationships at issue here: the relationship between Grange and its policyholders; the relationship between 20/20 and its customers; and finally the relationship between Grange and 20/20. That last relationship, between the insurer and the service provider, is not independent of the other two. Instead, it is completely dependent on those other relationships. As noted earlier, the relationship between Grange and its policyholders is predicated on a written contract, the insurance policy. When the policyholder's car sustains glass damage, Grange owes the policyholder a debt in the amount set forth in the insurance policy. Grange can certainly offer to settle that debt for something less than the full amount but if its offer is rejected, it has no ability to force a reduction of the debt.

20/20 has a contractual relationship with its customer, the Grange policyholder. 20/20 agrees to replace the damaged glass for the customer in exchange for a payment. That payment could be by cash, check, credit card or several other ways including through the assignment of a debt owed by someone else to the customer. Grange is a

complete stranger to that relationship and to the transaction between 20/20 and the customer and has no ability to interject itself into that arrangement. If the customer agrees to pay 20/20 in cash, Grange has nothing to say about either the amount the customer agrees to pay or the method of payment.

Similarly, 20/20 is a total stranger to the contractual relationship between Grange and its policyholder. Whatever the terms of the insurance policy, 20/20 has no ability, standing alone, to assert a claim or object to the language of the agreement. The relationship between 20/20 and Grange comes to existence upon the assignment of the insurance proceeds by the customer to 20/20 in payment for 20/20's services. At that point, 20/20 steps into the shoes of the policyholder, not for underwriting purposes but simply for collecting the already incurred debt.

Those relationships and their genesis are critically important to the issue of consideration. Grange acknowledges, as it must given the decisions from this Court, that altering the terms of a pre-existing contract, based upon performance of obligations that a party is legally obligated to perform, is not consideration. Grange's Return in Opposition at 20. Grange acknowledges the principle but then contends it has no application here because "there was no pre-existing contract between 20/20 and Grange" and thus it had no obligation to pay 20/20. *Id.* at 21. Grange completely ignores the existence of the assignment of what it owes to the policyholder from the policyholder to 20/20. Grange's promise to pay money to 20/20 is not consideration for anything; it is what Grange is obligated to do by operation of the assignment. It is the paradigm example of a pre-

existing legal obligation. Grange paid money to 20/20 not because of the alleged unilateral contract but because that payment was assigned to 20/20 by Grange.

Grange then contends that it was simply satisfying its policy obligations by paying to repair the damaged glass and that it had the right under the contract to enter into a contract with 20/20 to perform services at Grange's price. *Id.* Grange's argument here misses the target completely. First, the "payment of loss" provision cited by Grange specifies only how the debt may be paid, not how much is owed. The amount of the debt is set forth in the limit of liability section cited above. Second, using Grange's analysis, Grange could contract with any glass company it selected irrespective of the policyholder's preference so long as the policyholder's glass was repaired or replaced. That, however, is contrary to the statute cited above that grants the policyholder right to select the provider.

Grange contends that 20/20 could have entered into a contract with the customer but chose not to do so. Grange's Return in Opposition at 22, n. 10. That claim is flatly wrong. 20/20 did enter into a contract with the customer: 20/20 agreed to replace the damaged glass in exchange for assignment of the debt owed to the customer by Grange. Missing from Grange's opposition here as well as in its presentation to the trial court and the court of appeals is any claim that what Grange paid to 20/20 satisfied the obligations of its insurance policy as opposed to the unilateral contract. If Grange discharged its policy obligations, why not assert that defense and instead go to great lengths to prove it did something else?

The fact that Grange paid 20/20 cannot serve as consideration for the unilateral contract given the existence of the assignment. Similarly, the amount of money paid by Grange cannot be consideration in this situation, again because of the assignment. Given the debt that Grange owed its policyholder, the payments it made to 20/20 would be classified in one of three ways: less than what it owed, what it owed, more than what it owed. Grange has never contended that it paid 20/20 more than what the policy obligated it to pay. Anything other than a payment of more than what it owed cannot be consideration for the unilateral contract because in one perspective, it is only paying what it is obligated to pay and in the other it is paying less.

4. Resolution of the conflict of other jurisdictions in addressing this issue merits decision by the Supreme Court and not merely the intermediate appellate court.

Grange argues that decisions from other states, specifically Idaho, Washington and North Carolina, are in line with the decision below and therefore this Court need not review this decision. Grange is wrong for at least two reasons: (1) the decisions in the three states cited are plainly distinguishable and thus should never have been relied upon to resolve this case; and (2) other decisions, on facts that are identical to here, reach the conclusion that no unilateral contract could be formed. Accordingly, the Supreme Court, not the court of appeals, should determine the direction of South Carolina jurisprudence on an issue such as this, even if the Court believes at this point that the decision below may have been correct.

Grange, and the court of appeals in *Southern Glass*, rely on *Cascade Auto Glass v. Idaho Farm Bureau*, 115 P.3d 751 (Idaho 2005). That reliance is entirely misplaced. In

Idaho Farm Bureau, the insurance policy at issue provided that the insurer's financial obligation was to be determined one of two ways: (1) "the cost of repair agreed upon by us" or (2) "an estimate written based upon . . . 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." 115 P.3d at 751-52. The court interpreted the word "us" under option (1) to mean the insurer. *Id.* at 754. This, the court explained, authorized the insurer to enter "unilateral agreements about what amounts it will pay . . . for repair services." *Id.* at 755. There is no similar language in Grange's insurance policy that would authorize Grange to unilaterally determine the amount owed for damaged automobile glass.

Similarly, *Cascade Auto Glass v. Progressive Cas. Ins. Co.*, 145 P.3d 1253 (Wash. App. 2006), is completely distinguishable from the facts presented here. In the Washington case, the auto glass provider and the insurer had a pre-existing written contract that was terminable at will. 145 P.3d at 1255. Applying Washington law, the Washington Court of Appeals wrote that "a terminable-at-will contract may be unilaterally modified." *Id.* at 1257. The court went on further to favorably cite to *Idaho Farm Bureau* and write that Progressive, because of the ability to unilaterally modify a terminable at will contract, could, like Idaho Farm Bureau, unilaterally determine the amounts it would pay for auto glass replacement services. *Id.* at 1258. Here, there is no prior existing contract between Grange and 20/20 would permit Grange to unilaterally determine the amounts owed on glass replacement claims.

The third case relied on, *CIM Ins. Corp. v. Cascade Auto Glass*, 660 S.E.2d 907 (N.C. App. 2008), is also distinguishable. There, the glass provider acknowledged that it

had received offers from the insurer. 660 S.E.2d at 910. Moreover, there is no indication in the opinion that the glass company was paid by its customers with an assignment of the insurance proceeds owed. Finally, and perhaps most importantly, the insurance company in *CIM* paid the glass company "pursuant to the terms of the unilateral contracts entered into between the parties." *Id.* Here, as noted above, Grange did not pay pursuant to the terms of the so-called unilateral contracts.

In contrast, the United States District Court for the District of Minnesota, affirmed by the United States Court of Appeals for the Eighth Circuit, determined that faxes containing the identical language to those used by Grange did not create unilateral contracts upon the performance of work by the glass company. *Alpine Glass v. Illinois Farmers*, 06-CV-1148 (PJS/RLE)(D. Minn. Mar. 30, 2007) *aff'd*, *Alpine Glass Inc. v. Ill. Farmers Ins. Co.*, 643 F.3d 659, 662 (8th Cir. 2011). Although the court of appeals in *Southern Glass* attempted to distinguish *Alpine* by contending that faxes with the language stating that performance of the work constitutes acceptance of the pricing, like those at issue here, were not sent in that case. 732 S.E.2d at 212. The court of appeals, however, was absolutely wrong. In its brief to the Eighth Circuit, Farmers wrote, citing to the record before the district court: "During the relevant time for this litigation (2003-2006), every Farmers' facsimile to Alpine included a confirmation of price terms and, under the price language, stated: 'Performance of services constitutes acceptance of the above price.' (A.111 At ¶16; A.141 at ¶16; A.145-48.)" Brief of appellant Illinois Farmers Insurance Company at pp. 1-15, *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, case number 10-1689 (filed May 27, 2010) (available at https://pacer.gov).

The case that most closely tracks the facts of this case was decided by the United States Court of Appeals in ways contrary to the court of appeals below. While the *Alpine* decision is not binding upon this court, the ruling there parallels the analysis that flows from South Carolina contract law and the facts are essentially identical. If that reasoning is to be rejected here, it should be done by this Court, not the court of appeals.

CONCLUSION

For the reasons stated, 20/20 Auto Glass respectfully requests that the South Carolina Supreme Court grant the writ of certiorari.

Respectfully submitted,

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