IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-1787

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

v.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The Circuit Court properly applied this Court's precedent in *Southern Glass & Plastics, Inc. v. Kemper*, a case with identical material facts, and found 20/20 entered into a binding unilateral contract with Grange.

II. The Circuit Court properly found the contract between Grange and 20/20 Auto Glass was supported by consideration.

III. The Circuit Court should be affirmed because the transaction that took place in this case followed the statutory requirements of South Carolina Code § 38-57-75.

STATEMENT OF THE CASE

In *Southern Glass & Plastics Company, Inc. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (Ct. App. 2012), this Court held that a unilateral contract is created when an insurer informs a glass repair company of the amount that it is willing to pay for auto glass repairs, tells the glass repair company that performance constitutes acceptance, and the glass company performs the glass repair services. The operative facts of this case are identical to those in *Kemper*. Since this Court rendered its decision in *Kemper*, South Carolina Code Section 38-57-75 has become law, codifying the exact transactions that took place in *Kemper* and in this case. Because the law has not changed since the *Kemper* decision was issued – in fact, South Carolina's insurance statutes are now directly in line with the holding in *Kemper* – the Circuit Court properly applied this Court's reasoning from *Kemper*, and this Court should affirm.

Respondents Grange Mutual Casualty and Trustgard Insurance Company[1] filed this declaratory judgment action on August 21, 2014 seeking a declaration that Appellant 20/20 Auto Glass, LLC ("20/20") entered into a unilateral contract with Respondents when it performed glass replacement work for five of Grange's insureds after Grange communicated the amount Grange was willing to pay for glass repair services. In each instance, a Grange insured had a vehicle

[1] Grange and Trustgard are related insurance companies. For ease of reference, both entities will be collectively referred to as "Grange."

sustain glass breakage. The insured selected 20/20 to perform repairs, and a three-way telephone call took place between Grange's authorized agent, the insured, and a 20/20 representative. During that three-way telephone call, Grange's agent informed 20/20 and the insured how much Grange was willing to pay for the repairs. 20/20 objected to the rate, but also guaranteed that the insured would not be required to pay anything out of pocket for the repairs. As a result, the insured chose to allow 20/20 to perform the work. Grange then followed the conversation up by sending a referral sheet to the glass repair company reiterating the price or rates that it would pay and stating that "performance of services constitutes acceptance of the communicated price and billing instructions." (Order, pp. 7-8).

After receiving the referral sheet, 20/20 performed the repair services without any additional communication to Grange and then sent invoices directly to Grange. Grange issued payments to 20/20 based on the price and rates previously offered by Grange in both the phone conversation and in the referral sheet prior to the work being performed. In each instance, 20/20 accepted and deposited the payments.

After accepting and depositing the checks, 20/20 contacted Grange purporting to invoke the appraisal provision in the Grange policies by using an "Assignment of Proceeds and Authorization to Pay" that 20/20 obtained from the Grange insureds after it performed the work. Before performing the work, 20/20 assured the Grange insureds that they would not be personally responsible for any amounts that Grange did not pay. (Stip. Facts, ¶ 26). Then, after performing the work, 20/20 had the insureds sign a Work Order giving the purported assignment. (Stip. Facts, ¶ 36).

This case came before the Honorable Judge R. Scott Sprouse in a bench trial on October 26, 2016. The parties submitted a Stipulation of Facts and Exhibits prior to trial. After hearing

the evidence and considering the arguments of the parties, the Circuit Court entered Findings of Fact, Conclusions of Law, and Final Judgment on December 6, 2016 ruling in Grange's favor and finding a unilateral contract was formed between the parties when 20/20 performed the glass repair services after Grange communicated the price it was willing to pay for the services. In doing so, the Circuit Court relied upon this Court's holding in *Kemper*, and found the facts indistinguishable from the relevant facts of this case.

In particular, the Circuit Court found 20/20 was on notice of the amount Grange was willing to pay prior to performing the glass repair services, 20/20 was familiar with the pricing structure and did not find the pricing or rates to be ambiguous, and Grange communicated in a fax referral sheet that "[p]erformance of services constitutes acceptance of the communicated price and billing instructions." (Order, pp. 7-8). Therefore, 20/20's performance of the work knowing the price Grange was willing to pay, constituted acceptance of Grange's offer, thereby creating a valid, binding unilateral contract. When Grange paid for the work at the offered price and 20/20 accepted and deposited the payment, Grange satisfied its obligations under the contract and the insurance policy.

Appellant filed a Motion to Reconsider on December 16, 2016. Grange filed a memorandum opposing the Motion to Reconsider on January 13, 2017, and the Circuit Court entered an Order denying Appellant's motion on January 18, 2017. This appeal followed.

STATEMENT OF THE FACTS

A. Grange's network of glass repair providers.

Grange and Trustgard are insurance companies that are authorized to transact business and write insurance policies in the State of South Carolina. (Stip. Facts, ¶ 1). Grange's glass claims

are generally handled through a third-party administrator, Safelite Solutions ("Safelite"). (Stip. Facts, ¶ 6).

Safelite works with Grange and other insurance companies to determine reimbursement rates for automobile glass repair and replacement work for given geographic areas based on quarterly reviews of National Auto Glass Specifications (NAGS) and industry data for glass claims. (Stip. Facts, ¶ 13). NAGS is the industry standard for providing benchmark prices and standard labor/installation times for automobile glass replacement parts. (Stip. Facts, ¶ 14). Both Grange and 20/20 base their pricing off NAGS benchmark prices. (Stip. Facts, ¶ 15).

Through Safelite, Grange informs glass shops what Grange is willing to pay for glass repair services under an insured's automobile insurance policy. Grange provides advance notice to all network and non-network glass shops of the rates Grange approves for glass claims. (Stip. Facts, ¶ 17). A "network glass shop" or "network provider" is a glass shop with whom an insurance company has an established, pre-existing agreement regarding the prices and rates for glass repair or replacement jobs. (Stip. Facts, ¶ 18). A "non-network glass shop" or "non-network provider" is a glass shop that does not have a pre-existing agreement with the insurer. (Stip. Facts, ¶ 18).

20/20 is not a member of the Grange network of glass shops and does not have a pre-established agreement with Grange regarding prices or rates. (Stip. Facts, ¶ 21). However, on or about April 15, 2011, Safelite sent a letter on Grange's behalf to all network and non-network glass shops in upstate South Carolina – including 20/20 – announcing the pricing and rates that had been established for shops in the area, which prices were effective for work performed on or after April 22, 2011. (Stip. Facts, ¶ 19).

Since January 2014, there are eighty-seven (87) glass shops and companies in Grange's South Carolina network that have performed glass services for Grange and Grange insureds at the

rates and pricing established by Grange. (Stip. Facts, ¶ 22). In addition, twenty-eight (28) non-network shops have also performed glass services for Grange and Grange insureds at the rates and pricing established by Grange. (Stip. Facts, ¶ 22). In total, at least one hundred fifteen (115) glass shops in South Carolina performed work at Grange's established rates between January 2014 and the date of the Stipulation of Facts signed on October 7, 2016.

B. Grange insureds approach 20/20 for glass repair services, and Grange communicates with the 20/20 representative and the insured.

When a customer approaches 20/20 to perform glass repair services under an insurance policy, a representative of 20/20 will connect the customer with the customer's insurance company or the company's representative – in this case, Grange's third-party administrator, Safelite.[2] (Stip. Facts, ¶ 25). Then, the customer, the 20/20 representative, and the Grange representative take part in a three-way call.

During the call, the Grange representative reiterates the amount it is willing to pay for the glass repair services. (Stip. Facts, ¶ 28). Then, the 20/20 representative reads a scripted response stating they accept the job but not the price. (Stip. Facts, ¶ 26). Nonetheless, the 20/20 representative also guarantees that the customer will not be responsible for any difference in the cost. (Stip. Facts, ¶ 26). Grange's representative then informs the insured that he or she may be responsible for any difference in price between what 20/20 charges – even though 20/20 has guaranteed that the customer will not have to pay anything – and the amount Grange is willing to pay in reimbursement – an amount that 115 shops in South Carolina have found acceptable. (Stip. Facts, ¶ 30).

[2] This case involves repair services performed for five Grange insureds. The parties agree that each of the transactions were materially the same for purposes of this case.

20/20 admits in this case that it never found Grange's representatives' responses vague or ambiguous. (Stip. Facts, ¶ 31). After the telephone call, Grange's representative sends a document to 20/20 containing a dispatch or referral number. 20/20 receives the referral sheet before performing the work. (Stip. Facts, ¶ 51). The referral sheet reiterates the price or rates that Grange is willing to pay for glass repair services. (Stip. Facts, ¶ 52). Importantly, the referral sheet also contains the following statement: "Performance of services constitutes acceptance of the communicated price and billing instructions." (Stip. Facts, ¶ 53).

20/20 further admits it understood Grange was not willing to pay any amount greater than the prices or rates stated over the phone by the claims representative, previously communicated to 20/20 by letter, and confirmed in the referral sheet. (Stip. Facts, ¶ 31). Moreover, 20/20 never communicates a counterproposal to Grange for the price of the glass repair services. (Stip. Facts, ¶ 32). Instead, 20/20 simply proceeds with the work with the only price ever communicated between the parties being the amount that Grange stated it was willing to pay. (Stip. Facts, ¶ 32).

20/20 submits an invoice to Grange for the glass repair services that exceeds the amount Grange previously stated it was willing to pay. (Stip. Facts, ¶ 56). In accordance with all of its communications before the work was performed, Grange sends payment for an amount less than 20/20's invoice but in the amount previously communicated by Grange. (Stip. Facts, ¶ 57). In each instance, 20/20 accepts and deposits the payment. (Stip. Facts, ¶ 57). Then, after accepting and depositing the payment, 20/20 sends a "Short Pay Invoice" to Grange. (Stip. Facts, ¶ 58).

Months later, 20/20 makes a demand for appraisal under the terms of the insurance policy as a purported assignee of the insured's rights under the policy. (Stip. Facts, ¶ 61). 20/20 obtains the assignment from the insured after the three-way telephone call during which 20/20 assures the insured that he or she will have no out-of-pocket obligations for the glass repair services. In fact,

the insured signs the Work Order providing the assignment after the work has been completed. (Stip. Facts, ¶ 55, 69, 82, 101). The assignment reiterates that 20/20 "agrees not to charge the [insured] any amount excluding any applicable deductible, when insurance proceeds are the chose[n] method of payment." (Stip. Facts, ¶ 81). The Work Orders do not state the amount that is being charged for the glass repair services.[3] (Stip. Facts Exs. E, K).

C. The Grange insurance policy.

The policy terms in this case are the same for each customer. In the policy, Grange "agrees to pay for" certain losses to a covered auto, including for glass breakage. (Policy, p. D-1). The policy gives Grange the express right, at its option, to "pay to repair or replace the damaged or stolen property." (Policy, p. D-4). Grange limits its coverage to that "[a]mount necessary to repair or replace the property using parts from the vehicle's manufacturers or parts from other manufacturers." (Policy, p. D-4).

20/20 purports to evoke the policy's appraisal provision, which deals with disputes between an insured and the insurer over the actual cash value of the insured vehicle, not the cost of repairs. The provision states:

> **Appraisal**
>
> **A.** If **we** and **you** do not agree on the actual cash value of the vehicle, either party may demand an appraisal of the loss. In this event each party will select a competent and impartial appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

[3] Kelly Gregg, one of the Grange insureds who submitted a glass claim, signed a Work Order electronically. The Work Order was electronically converted – after Gregg had applied his signature – into an Invoice that included the price of the work performed. (Stip. Facts, ¶ 79).

(Policy, p. D-5). None of the claims in this case involve a dispute over the actual cash value of the vehicles.

ARGUMENT

The Circuit Court properly applied this Court's precedent set forth in *Kemper* – a case with identical relevant facts – and held that 20/20 entered into a unilateral contract with Grange. Grange communicated the price it was willing to pay for the glass repair services and sent a referral sheet stating that "performance of services constitutes acceptance of the communicated price and billing instructions." Then, without any further communication between 20/20 and Grange, 20/20 performed the glass repair services. Therefore, 20/20 entered into a binding unilateral contract with Grange to perform the glass repair services at the price previously established by Grange. When Grange paid that amount to 20/20 for the glass repair services, Grange satisfied it obligations under the contract and the insurance policy.

I. As this Court held in *Kemper*, Grange's unambiguous communication of the price it was willing to pay for the work constituted a unilateral offer, and 20/20's performance of glass repair services constituted acceptance of a unilateral contract at the price stated by Grange.

Grange communicated the price that it was willing to pay to 20/20 before any work was performed. Grange communicated that performance constituted acceptance of the price. Then, after receiving the referral sheet with the offered price but without any further communication, 20/20 performed the work. As this Court held in *Kemper*, performance after receiving an unambiguous offer constitutes acceptance of the offer. Because 20/20 performed the work after receiving an unambiguous offer from Grange, its performance created a binding unilateral contract at the price offered by Grange.

A. **On facts that are materially identical to those in this case, this Court in *Kemper* found a unilateral contract.**

"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." *Kemper*, 399 S.C. at 492, 732 S.E.2d at 210 (quoting *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 910 (Ct. App. 2008)). A valid offer "identifies the bargained for exchange and creates a power of acceptance in the offeree." *Saunder v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). "A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance." *Id.* at 405, 581 S.E.2d at 165-66 (citation omitted).

The classic example of a unilateral contract includes an offer by a homeowner for a painter to paint his home for a fixed price, stating "I will pay you $50 if you paint my house." *Vanegas v. American Energy Srvs.*, 302 S.W.3d 299, 303 (Tex. 2009). The painter accepts the offer by performance – i.e., painting the home. The homeowner cannot attempt to decrease the price after the painter has completed the task, and the painter cannot paint the home and then tell the homeowner that he wants to be paid more than the offered price. By doing the work, the painter has accepted the contract. *See id.* ("But once the individual accepts the offer by performing, the promise to pay the $50 becomes binding.").

A unilateral contract has three elements: (1) a specific offer, (2) communication of the offer, and (3) performance. *Prescott v. Farmers Telephone Co-Op, Inc.*, 335 S.C. 330, 337, 516 S.E.2d 923, 926 (1999). Like the transaction in *Kemper*, each element is satisfied in this case.

The first and second elements are satisfied by communication of a clear offer by the offeror to the offeree. In *Kemper*, this Court quoted favorably from the North Carolina Court of Appeals decision in *CIM Ins. Corp.* dealing with the communication of an offer for a unilateral contract.

Notably, this Court recognized the many ways in which the insurance company in *CIM Ins. Corp.* communicated the amount it was willing to pay for the repair services prior to and after the performance of the work:

> 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.

Kemper, 399 S.C. at 492, 732 S.E.2d at 209-210 (citing *CIM Ins. Corp.*, 190 N.C. App. at 812, 732 S.E.2d at 910). These are precisely the same ways in which Grange communicated the amount it was willing to pay 20/20 for the repair services here. (Order, pp. 7-8, ¶. 7). Grange communicated the pricing or rates in four ways: (1) by letter sent by Safelite on Grange's behalf dated April 15, 2011, which 20/20 received; (2) by telephone during the three-way call with the Grange insured, 20/20 and the Grange representative; (3) by letter or fax in the referral sheet; and (4) by payment after receiving an invoice from 20/20. (Order, p. 7, ¶ 7).

As in *Kemper*, the first and second requirements for a unilateral contract in this case were satisfied when Grange communicated specific offers to 20/20 stating the price it was willing to pay for the glass repair services. The Circuit Court found Grange unambiguously communicated the price it was willing to pay 20/20 for the glass repair services. (Order, p. 3). Moreover, 20/20 concedes that it understood Grange's pricing structure and did not find the pricing or rates to be vague or ambiguous. (Order, p. 8, ¶ 7).

The third requirement for a unilateral contract was satisfied when 20/20 performed the glass repair services after receiving the referral sheet with Grange's offered price and without any further communication to Grange or Grange's representative. In *Kemper*, this Court held that the glass repair shop's performance of the repairs constituted acceptance of the offer: "By proceeding with the work after receiving notice of the prices via phone conversation and fax, Southern Glass

accepted the prices." *Id.* at 497, 732 S.E.2d at 212. The same transaction occurred here. After Grange sent referral sheets to 20/20 stating the amount it was willing to pay and that "[p]erformance of services constitutes acceptance of the communicated price and billing instructions," 20/20 performed the work. By doing so, 20/20 accepted the specific offer communicated by Grange and created a contract at the pricing offered by Grange.

The facts of this case are identical to those in *Kemper*. Grange stated the amount it was willing to pay and sent a referral sheet to 20/20 stating that performance constituted acceptance of Grange's offered price. 20/20 performed the work, thereby accepting the offer and creating a unilateral contract at Grange's offered price. Therefore, the Circuit Court properly relied upon this Court's holding in *Kemper* and found Grange's payment of the offered price after 20/20 performed the work satisfied Grange's contractual obligations.

B. Appellant's efforts to distinguish this case from *Kemper* fall flat.

In an effort to avoid this Court's binding precedent set forth in *Kemper*, Appellant argues this case is distinguishable. However, the facts of this case are identical to the material facts in *Kemper*, and the two cases are indistinguishable.

i. In *Kemper*, as in this case, the unilateral contract was not accepted or rejected by the glass company's words, but rather by its performance.

The adage that actions speak louder than words has particular significance in the context of unilateral contracts. Appellant claims *Kemper* is distinguishable because the glass company in that case verbally agreed to the insurer's pricing during the phone conversation. However, this Court held it was the company's actions, and not its words, that created the unilateral contract: "a unilateral contract was created by Southern Glass's *performing* the work on Kemper's insureds, not by Southern Glass's verbal response." *Kemper*, 399 S.C. at 498, 732 S.E.2d at 213 (emphasis in original). The glass company in *Kemper* objected to the transcript of the telephone conversation

and raised that issue on appeal. On appeal, this Court held admission of the transcript was not prejudicial because the glass company's performance constituted acceptance of the contract.

Like 20/20 here, the glass company in *Kemper* routinely informed Safelite – the third-party administrator for glass claims – that the glass company rejected the quoted rates, that its contract was between the glass company and the customer, and that it was not entering into a contract by performing the work. *Id.* at 488, 732 S.E.2d at 208. Despite the glass repair shop's words, the Court in *Kemper* held that the shop's actions – performing the work – constituted acceptance of the contract at the price offered by the insurer. The same rule applies here. Regardless of 20/20's words, its conduct in performing the work after Safelite sent the referral sheet stating that performance constitutes acceptance created a binding unilateral contract.

ii. The Supreme Court's decision in *Narruhn v. Alea London Ltd.* has no application in this case.

In an apparent effort to avoid this Court's clear precedent in *Kemper*, Appellant argues that South Carolina law has changed as a result of the Supreme Court's decision in *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013). That case dealt with a post-judgment assignment of an insured's breach of contract claim for failure to defend and indemnify an insured under a liability policy. None of those issues are present in this case. The glass breakage claims are wholly unrelated to liability claims, there is no judgment against any insured, and Grange satisfied its contractual obligations to its insureds – their windows were repaired at no cost to the insured. Therefore, *Narruhn* has no relationship to the issues in this case.

Instead of relying on the actual holding in *Narruhn* – which merely held that an insurance company lacked standing to object to a judicial assignment of an insured's claim in a case to which the insurance company was not a party – Appellant argues that *dicta* in the *Narruhn* opinion changed South Carolina law. Specifically, Appellant argues the holding in *Narruhn* changed South

Carolina law with respect to assignments of an insured's rights after a loss. However, the Supreme Court clearly stated that it was ***not*** ruling on that issue: "***Although we need not reach the issue here,*** it appears the referee did not believe Insurer's approval of the assignment of RKC's rights was required, and we note it is generally held that an assignment after a loss has already occurred does not require an insurer's consent." *Id.* at 344, 745 S.E.2d at 93-94 (emphasis added). The holding in *Narruhn* did not purport to change South Carolina law.[4]

The glass repair shop in *Kemper* obtained assignments from the insureds. *Kemper*, 399 S.C. at 488, 732 S.E.2d at 208. There has been no change in the law of post-loss assignments since *Kemper*. Because the Supreme Court's holding in *Narruhn* did not create any substantive change in South Carolina law with respect to post-loss assignments, the opinion in *Narruhn* has no bearing on this case, and the holding in *Kemper* controls here.

The Supreme Court's holding in *Narruhn* has no bearing here for a second reason: The Circuit Court here did not rely on the assignment in reaching its decision. The question in this case is whether 20/20 entered into a unilateral contract with Grange – not Grange's insured – when 20/20 performed glass repair services after Grange communicated the amount it was willing to pay for the services and communicated that performance constituted acceptance of Grange's offer. If there is a unilateral contract, then the assignment is irrelevant because Grange satisfied its obligations under both the unilateral contract and the insurance policy when it paid and 20/20 accepted and deposited the payment. At that point, the glass was repaired – satisfying Grange's promise under the insurance policy – and the repairs were paid for – satisfying Grange's promise under the unilateral contract. Therefore, the assignment is not relevant to the issues in this case.

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[4] Despite Appellant's argument that *Narruhn* changed the law with respect to post-loss assignments, Appellant states in its brief that the Supreme Court "reaffirmed its view" regarding post-loss assignments. (Initial Brief of Appellant, p. 13).

iii. The out-of-jurisdiction cases cited by Appellant are the same cases this Court considered in *Kemper*.

In *Kemper*, this Court evaluated cases from five other jurisdictions and found that the facts of the *Kemper* case – which are materially identical to the facts in this case – were more in line with the other jurisdictions that had found a unilateral contract. *Kemper*, 399 S.C. at 498, 732 S.E.2d at 213 ("The present case is more in line with the North Carolina, Idaho, and Washington cases."). In particular, this Court relied upon the North Carolina Court of Appeals' decision in *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 660 S.E.2d 907, 910 (2008), the Idaho Supreme Court's decision in *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 115 P.3d 751 (2005), and the Washington Court of Appeals' decision in *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wash. App. 760, 145 P.3d 1253 (Ct. App. 2006). In each of those cases, the appellate courts held that the glass company's performance of glass repair services after receiving offers from the insurers created binding unilateral contracts.

In *CIM Ins. Corp*, the North Carolina Court of Appeals found the glass company accepted a unilateral contract by performing work after the insurer communicated the amount it was willing to pay. 190 N.C. App. at 812, 660 S.E.2d at 910 ("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."). Like in this case, the glass service company in *CIM Ins. Corp.* disputed the prices set by the insurance company. *Id.* at 809, 660 S.E.2d at 909. However, just like this Court in *Kemper*, the North Carolina Court of Appeals looked to the glass service company's actions, not its words, in determining that a unilateral contract was formed. "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. By choosing to do the work, the glass company accepted the insurance company's offer. *Id.*

Appellant attempts to distinguish *CIM Ins. Corp.* on two grounds. First, Appellant claims the facts in *CIM Ins. Corp.* are different because the glass company in that case did not get an assignment from the insureds. This argument is a *non-sequitur.* Whether 20/20 obtained an assignment from the insured is wholly irrelevant because 20/20 entered into a unilateral contract with Grange by performing the work. The contracts between Grange and its insureds stated that Grange – at its own option – could choose to pay to repair the glass. By entering into a unilateral contract with 20/20 to repair the glass and paying 20/20 the amount owed under that unilateral contract, Grange satisfied its obligations under the insurance policies. Therefore, the assignment has no bearing on the facts of this case and would not have had any bearing on the case in *CIM Ins. Corp.*

Appellant also argues that the Court in *CIM Ins. Corp.* failed to address the requirement of consideration. However, the Court in that case – and this Court in *Kemper* – did not discuss consideration because the consideration was obvious. The amount offered by Grange for the glass repair services is the most classic form of consideration – money. Grange offered to pay 20/20 a fixed sum if 20/20 performed repairs to Grange's customers' glass. Consideration from Grange came in the form of the monetary payment, and acceptance from 20/20 came in the form of performing the work. Therefore, the contract was supported by adequate consideration.[5]

Appellant's arguments with respect to *Progressive Cas. Ins.* likewise fail to show a meaningful distinction. Appellant argues *Progressive Cas. Inc.* is different because the glass company in that case had a prior contract with the insurance company. However, the holding in *Progressive Cas. Ins.* did not rely upon the prior contractual relationship. In fact, the Washington Court of Appeals held that the prior contract was terminated by the insurance company when it

[5] The issue of consideration is further discussed below in Section III.

notified the glass company of changes in its approved rates for glass repair services. *Progressive Cas. Inc. Co.*, 135 Wash. App. at 768-69. After making that determination, the Court of Appeals found that – despite the fact that any prior contracts were no longer effective – the glass company entered into new unilateral contracts with the insurer every time it performed glass repair services after the insurer communicated the amount it was willing to pay.[6] *Id.* at 769 ("Cascade created binding unilateral contracts each time it repaired or replaced auto glass for Progressive's insureds after receiving Progressive's new offer."). Likewise, 20/20 entered into a unilateral contract with Grange each time it performed glass repair services. Therefore, the holding in *Progressive Cas. Ins.* fits squarely with the facts of this case.

Lastly, Appellant attempts to distinguish *Idaho Farm Bureau Ins. Co.*, based on the specific policy language at issue in that case. Admittedly, the Farm Bureau policy in that case had somewhat different language. However, this Court's reliance on the opinion in *Idaho Farm Bureau Ins. Co.* was not based upon the policy language. Rather, this Court cited the Idaho Supreme Court's decision for the description of the options that the auto glass company had when faced with the offer from the insurance company:

> 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.

Idaho Farm Bureau Ins. Co., 141 Idaho at 664, 115 P.3d at 755. The Idaho Supreme Court found the glass company chose the first option by performing the work. *Id.*

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[6] The insureds in *Progressive Cas. Ins.* also gave assignments to the glass repair shop. *Id.* at 763, 145 P.3d at 1254. Nonetheless, the Washington Court of Appeal – like this Court in *Kemper* – focused on the contract entered into between the insurer and the glass repair company.

20/20 had the same three choices as the glass company in *Idaho Farm Bureau Ins. Co.* 20/20 could choose to do the work at the price offered by Grange – which it did. Alternatively, 20/20 could have accepted payment from Grange for the amount Grange offered and then sought to pursue the difference from the insured. However, 20/20 precluded itself from this avenue by guaranteeing to the insured before the job was assigned to 20/20 that the insured would never have to pay anything out of pocket. Lastly, 20/20 could have refused to deal with Grange at all and simply contracted with the insured, making the insured pay, and leaving the insured to pursue recovery directly from Grange. Obviously, 20/20 did not choose the last two options.

The quoted language from *Idaho Farm Bureau Ins. Co.* highlights the problem with 20/20's approach in this case. 20/20 claims it is entitled to additional recovery under the insurance policy because the insured can choose whatever glass company it wants, and the insured signed an assignment of its claim to 20/20. However, if the insured had ever faced the risk that 20/20 would seek a direct payment from the insured for the glass services, then the insured would never have selected 20/20. Instead, the insured would have chosen to go to one of the 115 auto glass servicers in South Carolina who would do the work at Grange's rate. To avoid this problem and obtain the work, 20/20 guarantees to the insured that the insured will never be charged for any work. The guarantee is an inducement to get the insured to choose 20/20 to perform the work.

Only after receiving the guarantee does the insured agree to allow 20/20 to do the work. (Stip. Facts, ¶¶ 26, 29-30, 36). Nonetheless, 20/20 claims that the assignment from the insured – obtained ***after*** the work has already been completed – somehow allows 20/20 to obtain more than the amount Grange has agreed to pay. An assignee is in no better position than the assignor. *See e.g.*, *First Nat. Bank of S.C. v. Wade*, 245 S.C. 426, 430, 141 S.E.2d 102, 104 (1965) ("generally

the assignee has no better rights than his assignor.") (citation omitted). If the insured was never under an obligation to pay any money to 20/20, then neither is Grange.

iv. This Court in *Kemper* already distinguished and disagreed with the other out-of-jurisdiction cases cited by 20/20.

In *Kemper*, this Court reviewed and rejected the Eighth Circuit's reasoning in *Alpine Glass, Inc. v. Ill. Farmers Ins. Co.*, 643 F.3d 659 (8th Cir. 2011) and the Connecticut Supreme Court's reasoning in *Auto Glass Express, Inc. v. Hanover Ins. Co.*, 293 Conn. 218, 975 A.2d 1266 (2009).[7] In both of those cases, the appellate courts did not discuss any communication from the insurers to the glass companies that performance would constitute acceptance of the offered price. In *Auto Glass Express*, the Court expressly found that no such message was communicated to the glass company. *See* 293 Conn. at 228, 975 A.2d at 1273. In *Alpine Glass, Inc.*, the Eighth Circuit never discusses the referral sheet. Instead, the Eighth Circuit's opinion only discusses "blast faxes" that were sent to glass repair shops throughout Minnesota. *See* 643 F.3d at 662. In the analysis section of the Eighth Circuit's opinion, the Eighth Circuit again focuses on the "blast fax" and never references or even acknowledges the referral sheet. *Id.* at 666-67 ("Even if the blast faxes constituted offers . . . .").

Although 20/20 digs so deep as to cite the parties' briefs in the *Alpine Glass* case to show that the insurance company in that case sent a referral sheet to the glass service shop stating that performance constituted acceptance, there is no indication whatsoever that the Eighth Circuit ever

[7] Although 20/20 argues that those distinctions are misplaced, it makes no substantive argument for why this Court improperly distinguished *Auto Glass Express*. As this Court noted in *Kemper*, the offers in *Auto Glass Express* case did not include language that performance constituted acceptance: "Moreover, nothing 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." *Auto Glass Exp., Inc.*, 293 Conn. at 228, 975 A.2d at 1273; *see also Kemper*, 399 S.C. at 495, 732 S.E.2d at 211. Therefore, Grange's referral letters stating that performance constitutes acceptance – like the referral letters in *Kemper* – clearly distinguish this case from the facts in *Auto Glass Exp., Inc.*

considered or was aware of that fact. Nothing in the Eighth Circuit's written opinion discusses the fact. This Court cannot divine the Eighth Circuit's impressions concerning the impact of the referral sheet when the Eighth Circuit never even references it in its written opinion. Thus, the relevant fact at issue in this case and in *Kemper* – that the insurer sent a referral sheet specifically referencing the work to be performed on the insured's car, the price or rate that would be paid, and stating that "[p]erformance constitutes acceptance of the communicated billing price and billing instructions" – does not appear to have been considered by the Eighth Circuit, and the case is properly distinguished. (Stip. Facts ¶ 53, 67, 78, 101).

The Eighth Circuit's opinion in *Alpine Glass* is distinguishable for another significant reason. In *Alpine Glass*, the Eighth Circuit mistakenly applied a rule that applies to bilateral contracts. The Eighth Circuit held that "[i]f 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." 643 F.3d at 666 (quoting *Markmann v. H.A. Bruntjen Co.*, 249 Minn. 281, 81 N.W.2d 858, 862 (1957)). Respectfully to the Eighth Circuit, this rule of contract law does not apply in the context of a unilateral contract under South Carolina law. Rather, it applies to the formation of bilateral contracts.

The *Markmann* case that the Eighth Circuit relies upon addresses contract principles that expressly apply to bilateral contracts, not unilateral contracts. *Markmann*, 249 Minn. at 288-89, 81 N.W.2d at 863 ("If the contemplated agreement is to be bilateral, the proposal must state the terms of each promise in full.") (quoting 1 Corbin, Contracts, § 83, p. 262). Then, the Court in *Markmann* found the contract in that case was bilateral: "We have no difficulty in reaching the conclusion in the instant case that the contract agreement contemplated between the parties was by its terms a bilateral one." *Id.*

In contrast, acceptance of a unilateral contract occurs through substantial performance. If performance is completed, but non-conforming, the performance simultaneously constitutes acceptance and a breach of the contract, but it does not constitute a counteroffer. *See e.g.*, 25 Wash. Prac., Contract Law and Practice § 2:19 (3d ed.) ("In the case of unilateral contracts, acceptance occurs only through performance. Substantial performance (rather than full performance) is sufficient to constitute acceptance of an offer to form a unilateral contract, although defective performance may constitute a breach of the contract."); Howard Engelskirchen, *Consideration as the Commitment to Relinquish Autonomy*, 27 Seton Hall L. Rev. 490, n. 186 (1997) ("Just as with a promise followed by a defective performance in breach of the promise, so too for a unilateral contract a defective performance may be in breach of the commitment offered in acceptance of the promisor's offer, but in this instance the commitment is expressed by action and may be breached by the action that expresses it.").

By performing the glass repair services after Grange stated that performance constituted acceptance, 20/20 accepted the contract at Grange's price. Like the painter in the classic unilateral contract example, if the painter performs the work and then submits an invoice to the homeowner for more than the amount offered, his performance nonetheless constitutes acceptance, but the homeowner is only required to pay the amount previously offered. Likewise here – and in contrast to the Eighth Circuit's bilateral contract reasoning in *Alpine Glass* – 20/20 accepted the unilateral offer by performing the work. Therefore, its decision to submit an invoice for more than the contractual price cannot be construed as a counteroffer.

II. Grange's offer to pay 20/20 Auto Glass for glass repair services and subsequent payment constitutes both consideration sufficient to create the contract and satisfaction of its contractual obligations to both 20/20 and its insureds.

Grange contracted with its insureds to pay to repair the insured's car's windshield in the event of breakage. Grange expressly reserved the right to pay for the repair rather than making a

payment to the insured. (Policy, p. D-4) ("We may, at our option, pay to repair or replace the damaged or stolen property."). Therefore, when the insured sustained glass breakage, Grange could have paid the insured for the "amount necessary to repair or replace the property" or it could simply pay a vendor to have the property repaired. Grange chose the latter option in each of these instances. There is no claim that Grange paid its insureds directly. Instead, Grange chose to offer a fixed rate or price to 20/20 to perform the glass repairs, which 20/20 admittedly did in this case.

To avoid this Court's finding in *Kemper* and the Circuit Court's finding here that 20/20's performance constituted acceptance of Grange's unilateral offer, 20/20 argues that Grange's offer lacked consideration because Grange was already contractually obligated to its insured to pay for repairs to the windshield.[8] However, the mere fact that Grange was satisfying another contractual obligation by contracting with 20/20 to perform the repairs does not mean that Grange's offer to pay money to 20/20 lacked consideration. Grange had no contractual obligation to pay money directly to its insured. At its option, Grange could choose to pay to repair the vehicle instead of paying its insured, which is exactly what it did here.

Grange had a contractual obligation to its insureds to pay to repair the windshields. Grange satisfied that obligation by entering into a separate unilateral contract with 20/20 to perform the repairs. Both contracts are enforceable by the parties to the contract. Suppose, for example, that Grange had entered into a bilateral contract with 20/20 instead of a unilateral contract, Grange paid 20/20 beforehand, and 20/20 failed to perform the glass repairs. Under those circumstances, Grange's insured could pursue Grange for failing to satisfy its obligations under the policy because

[8] Perhaps because there is no authority to the contrary, Appellant is forced to resort to citing an off-the-cuff oral holding in a summary judgment hearing in an out-of-jurisdiction case – citing to the transcript of a summary judgment hearing in a United States District Court in Minnesota. There is no legal analysis or supporting case law to support the holding.

Grange neither paid its insured directly nor paid to have the repairs performed. In turn, Grange could sue 20/20 for failing to perform the repairs that were promised. Both contracts are enforceable.

The cases cited by Appellant do not support its argument here. Two of the cases dealt with situations where one party to a contract attempted to change the contract's terms after entering into the contract. *See City of Spartanburg v. Spartan Villa*, 273 S.C. 1, 253 S.E.2d 501 (1978); *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 135 S.E.2d 311 (1964). Importantly, both of those cases only involved the same two parties to a pre-existing contract. One side of the pre-existing contract attempted to create a second contract between the same contracting parties in order to avoid a pre-existing contractual obligation between those two parties. *See Spartan Villa* (holding that a city could not increase the cost of a sewer permit after entering into a contract with a developer because the city was already contractually bound to provide sewer services for the development based upon the prior contract between the city and the developer); *Castell* (holding a debtor's promise to pay a liquidated debt on a truck after default was not sufficient consideration to create a new contract between the creditor and the debtor because the debtor already owed that obligation under the existing contract between the debtor and creditor).

Neither *Spartan Villa* nor *Castell* dealt with the creation of a new contract with a new party. Here, Grange did not use a promise to pay for repairs to modify an existing contract with any of its insureds. Rather, Grange used the offer to pay a fixed sum for repairs to create a new contract with a new party – 20/20 – in separate transactions. There was separate consideration paid in each of the five separate transactions.

In sum, Grange entered into a unilateral contract with 20/20 when 20/20 performed the work. At that point in time in each of the separate transactions, the price for the glass repairs was

fixed and binding. Therefore, the insureds' post-performance assignment of any benefits under the insurance contract cannot increase Grange's obligations to 20/20.[9]

When 20/20 performed the repairs, it accepted Grange's offer of a unilateral contract. When Grange paid 20/20 for the work at the price offered by Grange, Grange satisfied its contractual obligation to 20/20 under the unilateral contract. At the same time, Grange satisfied its contractual obligations to its insured under the insurance policy. Therefore, the Circuit Court correctly applied basic principles of contract law when it found that Grange's payment to 20/20 simultaneously satisfied its contractual obligations to both 20/20 and to its insureds. (Order, p. 9, ¶¶ 10-11).

III. After this Court's holding in *Kemper*, South Carolina Code § 38-57-75 became law, codifying the transactions that took place in *Kemper* and here.

20/20 is correct in one regard: South Carolina statutory law has changed since this Court's decision in *Kemper*. After this Court rendered its decision in *Kemper*, South Carolina Code § 38-57-75 came into effect on January 1, 2013. *See* S.C. Code Ann. § 38-57-75. Appellant cites this statute for the rule that an insured has the freedom to select whatever glass service shop he or she chooses. This is true. *See* S.C. Code § 38-57-75(A) (prohibiting an insurer from requiring that repairs be made by a particular provider of glass repair work). However, the statute does much more. Unlike the statutes cited by 20/20 from other jurisdictions, the South Carolina statute allows the insurer to establish rates that it believes are fair and reasonable and gives the insurer the right

[9] 20/20's citation to *McLeod v. Sandy Island Corp.*, 265 S.C. 1, 216 S.E.2d 746 (1975) is even less applicable. That case dealt with whether a father's agreement in a divorce settlement to convey stock to his minor child was a gift or a sale. *Id.* at 9, 216 S.E.2d at 749. The Court found that the provision in the divorce agreement for the father to convey stocks to his minor child was merely a gift and not a sale. *Id.* There is certainly no argument in the present case that Grange's payment to 20/20 constituted a gift.

to inform an insured that he or she may be responsible for the difference in cost if the insured selects a glass repair shop that charges a higher rate.

The interaction that took place in *Kemper* and in this case is now statutory. "When an insured requests to have covered glass repair work performed by a provider who is not a member of the insurer's or third party administrator's vehicle repair program" – such as 20/20 here – "the insurer or third party administrator must" take certain steps. S.C. Code § 38-57-75(E). The insurer "must confirm that the provider agrees to perform the repair at the insurer's fair and reasonable rate of reimbursement." S.C. Code § 38-57-75(E)(1). If the provider agrees to the rates, then no further statements regarding costs shall occur. However, if the provider does not accept the rates, "the insurer or third party administrator may inform the insured that he will be responsible for additional costs." S.C. Code § 38-57-75(E)(1). Grange satisfied this statutory requirement by informing the insured that he or she may be responsible for the additional cost ***even though*** 20/20 had already guaranteed during the telephone call that the insured would not be responsible for any additional cost. The Circuit Court found that the transactions that took place in this case followed this statutory approach. (Order, p. 4, n.1).

Nothing in the statute suggests that the insurer can be forced to pay the repair shop's higher rates. Instead, the insurer sets a "fair and reasonable rate of reimbursement," and the insured can be required to pay the difference if he or she insists on using the more expensive shop anyway.[10]

[10] The statutory language also makes the Idaho Supreme Court's holding in *Idaho Farm Bureau Ins. Co.* more applicable. The Supreme Court in that case relied on the fact that the insurance policy stated the insurer would pay "the cost of repair agreed upon by" the insurer. *Id.* at 661, 115 P.3d at 752. Under the South Carolina statute, Grange sets its "fair and reasonable rate." S.C. Code § 38-57-75(E) (using a possessive for the "***insurer's*** fair and reasonable rate" to indicate that the rate is established by the insurer). There is no meaningful difference between an amount "agreed upon" by the insurer or the "insurer's fair and reasonable rate." Both phrases indicate that the authority to set the amount owed under the policy rests with the insurer.

The only change that has taken place in South Carolina law since this Court's opinion in *Kemper* is the codification of the precise transaction that took place in *Kemper* and in this case. The new statute is consistent with and confirms the appropriateness of this Court's opinion in *Kemper*.

CONCLUSION

The Circuit Court properly found Grange entered into a unilateral contract with 20/20. By 20/20's own admission, Grange clearly communicated the amount it was willing to pay for the glass repair services, and Grange sent a referral sheet to 20/20 stating that performance constituted acceptance of the offered price. Then, after receiving the referral sheet, 20/20 performed the work without any additional communication with Grange. By doing so, 20/20 entered into a binding, unilateral contract at Grange's offered price. When Grange issued payment in the amount offered, Grange satisfied its contractual obligations to 20/20 to pay for the work. Likewise, by paying 20/20, Grange satisfied its contractual obligations under the insurance policy to pay for repairs to the glass. Therefore, the Circuit Court properly entered judgment in favor of Grange, and this Court should affirm.

As noted by the Supreme Court of Idaho in *Idaho Farm Bureau Ins. Co.*, there may be other causes of action or challenges which could be asserted if an insured believed the rates the insurer was willing to pay were not fair and reasonable. 141 Idaho at 664, 115 P.3d at 755. Those issues do not apply here because the insured was promised by 20/20 Auto Glass before any work was ever performed that the insured would not be personally responsible for any of the glass repair cost. Therefore, this is not a situation where the insured – or 20/20 as the insured's purported assignee – could not get the work done at Grange's fair and reasonable rate.

Respectfully submitted,

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July 17, 2017

IN 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

RECEIVED
JUL 17 2017
SC Court of Appeals

Case No. 2014-CP-04-1787

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

v.

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

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorney for Respondents, do hereby certify that I have served a copy of the foregoing, **Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal,** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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July 17, 2017

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

Re: Grange Mutual Casualty and Trustgard Ins. Co. vs. 20/20 Auto Glass, LLC
Civil Action No.: 2014-CP-04-1787
Claim No.: APV001633599
Our File No.: 1300-0060

Dear Ms. Kitchings:

Enclosed for filing please find the original and three (3) copies of the Initial Brief of Respondent and Designation of Matters to be Included in the Record on Appeal with regard to the above-referenced matter.

Jason Luther who handled this matter before the Circuit Court is no longer employed at Murphy & Grantland, P.A. Therefore, I will be handling this matter on behalf of the Respondents Grange Mutual Casualty and Trustgard Insurance Company going forward.

By copy of this letter, I am serving Appellant's counsel with a copy of the Initial Brief of Respondent and Designation of Matters to be Included in the Record on Appeal and notifying them of my appearance in this matter. If you have any questions or need any further information from me, please do not hesitate to call.

With kind regards, I am

Sincerely,

Wesley B. Sawyer

WBD/bsh
Enclosure
cc: Joshua M. Henderson, Esquire (via e-mail & U.S. mail)
Charles J. Lloyd, Esquire (via e-mail & U.S. mail)

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JUL 17 2017
SC Court of Appeals