IN THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2020-000462

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

v.

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

RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Wesley B. Sawyer, Esquire
Ronald B. Diegel, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondents Grange Mutual Casualty and Trustguard Insurance Company

Other Counsel of Record:

Joshua M. Henderson
Henderson, Brandt & Vieth, P.A.
360 East Henry Street, Suite 101
Spartanburg, South Carolina 29302
(864) 582-2962

Charles J. Lloyd
Livgard & Lloyd, P.L.L.P.
2520 University Avenue SE, Suite 202
Minneapolis, MN 55414
(612) 825-7777

Attorneys for Petitioner

INTRODUCTION

This case involves the routine process for handling glass repair claims under automobile insurance policies. In *Southern Glass & Plastics Company, Inc. v. Kemper*, 399 S.C. 83, 732 S.E.2d 205 (Ct. App. 2012), the Court of Appeals held a unilateral contract is created when an insurer informs a glass repair company of the amount it is willing to pay for auto glass repairs, tells the glass repair company performance constitutes acceptance, and the glass company performs the glass repair services. Because the material facts in this case are identical to those in *Kemper*, the Circuit Court and Court of Appeals found that Petitioner 20/20 Auto Glass, LLC ("20/20") entered into a binding unilateral contract with Grange when it performed the repair work.

The only change in the law since the Court of Appeals' decision in *Kemper* is that § 38-57-75 became effective, codifying the process that took place in *Kemper* and here. Because the Circuit Court and Court of Appeals decisions here align perfectly with prior precedent and South Carolina's insurance statutes, certiorari should be denied.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. **Whether the Circuit Court and Court of Appeals correctly applied the Court of Appeals' precedent in *Southern Glass & Plastics, Inc. v. Kemper*, a case with identical material facts, and found 20/20 Auto Glass, Inc. entered into a binding unilateral contract with Grange.**

II. **Whether the Circuit Court and Court of Appeals should be affirmed because the transaction that took place followed the statutory requirements of South Carolina Code § 38-57-75, which codified the transaction in *Southern Glass & Plastics, Inc. v. Kemper*.**

STATEMENT OF THE CASE

A. Procedural History.

Respondents Grange Mutual Casualty and Trustguard Insurance Company (collectively referred to herein as "Grange") filed this declaratory judgment action on August 21, 2014 seeking

a declaration that Petitioner 20/20 entered into a unilateral contract with Grange when it performed glass replacement work for five of Grange's insureds. In each instance, a Grange insured sustained damaged to a window or windshield in their vehicle and approached 20/20 to have the glass repaired. In each case, 20/20 promised the Grange insured that he or she would incur no out of pocket expenses other than any applicable deductible. As part of the process, a three-way telephone call took place involving Grange's authorized agent, a 20/20 representative, and the insured. During the call, Grange communicated the amount it was willing to pay for the repairs. Then, the 20/20 representative objected to the rate but also guaranteed the insured he or she would not have to pay anything out of pocket. As a result, the insured chose to allow 20/20 to perform the work.

After the phone call, but before 20/20 performed the work, Grange faxed a referral sheet to 20/20 stating the amount Grange was willing to pay for the work and stating that "Performance of services constitutes acceptance of the communicated price and billing instructions." (R. p. 99, ¶ 53). After performing the work – which was performed after receiving the referral sheet and after promising the insured that he or she would not owe anything out of pocket – 20/20 had the insured sign a Work Order containing an assignment clause. 20/20 billed Grange, and Grange sent payment for the work in at least the amount agreed upon on the phone and in the referral sheet. Then, 20/20 sent a short-pay invoice asking for additional payments from Grange, and 20/20 eventually asked for appraisal. As a result, Grange filed this declaratory judgment action.

The 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 Grange and 20/20 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 the Court of Appeals' holding in *Kemper* and found the material facts in *Kemper* indistinguishable from the relevant facts of this case.

Appellant filed a Motion to Reconsider on December 16, 2016, which the Circuit Court denied on January 18, 2017. Appellants filed a Notice of Appeal on February 13, 2017.

On December 1, 2019, the Court of Appeals affirmed finding: (1) 20/20's performance of the glass repair services constituted acceptance of Grange's offer, creating a unilateral contract; (2) the contract was supported by consideration (Grange promised to pay – and did pay – 20/20 for the services); and (3) the Circuit Court properly relied on *Kemper* and the statutory framework enacted in South Carolina Code Section 38-57-75.

B. Stipulated Facts.

1. Grange's network of glass repair providers.

Grange and Trustguard are insurance companies authorized to transact business and write insurance policies in South Carolina. (R. p. 90, ¶ 1). Grange's glass claims are generally handled through a third-party administrator, Safelite Solutions ("Safelite"). (R. p. 91, ¶ 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. (R. p. 92, ¶ 13). NAGS is the industry standard for providing benchmark prices and standard labor/installation times for automobile glass replacement parts. (R. p. 92, ¶ 14). Both Grange and 20/20 base their pricing off NAGS benchmark prices. (R. p. 92, ¶ 15).

Through Safelite, Grange informs glass shops what Grange is willing to pay for glass repair services under an automobile insurance policy. Grange provides advance notice to all network and non-network glass shops of the rates Grange approves for glass claims. (R. p. 93, ¶ 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. (R. p. 93, ¶ 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. (R. p. 93, ¶ 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. (R. p. 93, ¶ 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. (R. p. 93, ¶ 19).

Between January 2014 and the date of the Stipulation of Facts entered on October 7, 2016, eighty-seven (87) glass shops and companies located in South Carolina participated in Grange's network and performed glass repair services for Grange and Grange insureds at the rates and pricing established by Grange. (R. p. 93, ¶ 22). Moreover, an additional twenty-eight (28) non-network shops in South Carolina performed glass repair services for Grange and Grange insureds at the rates and pricing established by Grange. (R. p. 93, ¶ 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 October 7, 2016.

2. Grange insureds approach 20/20 for glass repair services, 20/20 promises the insured that he or she will not owe any out of pocket to 20/20, Grange communicates to 20/20 the price it is willing to pay for the work, and 20/20 performs the work.

When a customer approaches 20/20 to request 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. (R. p. 94, ¶ 25). Then, the customer, the 20/20 representative, and the Grange representative take part in a three-way call.

The format of the call is governed by statute, but it is the same call that took place in *Kemper* before the statute was enacted. During the call, the Grange representative reiterates the amount it is willing to pay for the glass repair services. (R. p. 95, ¶ 28). Then, the 20/20 representative reads a scripted response stating they accept the job but not the price.[1] (R. p. 94, ¶ 26). However, the 20/20 representative also guarantees that the customer will not be responsible for any difference in the cost. (R. p. 94, ¶ 26). Thereafter, Grange's representative 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. (R. p. 95, ¶ 30). Based upon this communication and the guarantee made by 20/20, the insured confirms that he or she is choosing to have 20/20 perform the work.

[1] In *Kemper*, the parties disputed whether the glass repair shop agreed to the price during the call. 399 S.C. at 488-89, 732 S.E.2d at 208. However, the Court of Appeals in *Kemper* found this dispute immaterial because the unilateral contract was created when the glass repair company performed the work. *Id.* at 498, 732 S.E.2d at 213 ("Additionally, a unilateral contract was created by Southern Glass's *performing* the work on Kemper's insured, not by Southern Glass's verbal response.") (emphasis in original).

20/20 admits in this case that it never found Grange's representatives' responses vague or ambiguous. (R. p. 95, ¶ 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. (R. p. 99, ¶ 51). The referral sheet reiterates the price or rates that Grange is willing to pay for glass repair services. (R. p. 99, ¶ 52). Importantly, the referral sheet also contains the following statement: "Performance of services constitutes acceptance of the communicated price and billing instructions." (R. p. 99, ¶ 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. (R. p. 95, ¶ 31). Moreover, 20/20 never communicates a counterproposal to Grange for the price of the glass repair services. (R. p. 95, ¶ 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. (R. p. 95, ¶ 32).

After the work is completed – and after having promised the customer that he or she would owe nothing out of pocket for the work – 20/20 has the customer sign a Work Order that contains an assignment. (R. pp. 96, ¶¶ 35-36; p. 99, ¶ 55; p. 101, ¶ 69; p. 103, ¶ 82; p. 105, ¶ 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." (R. pp. 102-103, ¶ 81). The Work Orders do not state the amount that is being charged for the glass repair services.[2] (R. pp. 149 & 162).

[2] 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. (R. p. 102, ¶ 79).

20/20 then submits an invoice to Grange for the glass repair services that exceeds the amount Grange previously stated it was willing to pay. (R. p. 99, ¶ 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 at least in the amount previously communicated by Grange. (R. p. 99, ¶ 57). In each instance, 20/20 accepts and deposits the payment. (R. p. 99, ¶ 57). Then, after accepting and depositing the payment, 20/20 sends a "Short Pay Invoice" to Grange. (R. p. 99, ¶ 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. (R. p. 100, ¶ 61).

3. 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. (R. p. 130). The policy gives Grange the express right, at its option, to "pay to repair or replace the damaged or stolen property." (R. p. 133, Payment of Loss). 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." (R. p. 133, Limit of Liability).

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.

(R. p. 134) (italics and underline added). None of the claims in this case involve a dispute over the actual cash value of the vehicles. Thus, despite 20/20's effort to invoke the appraisal clause, that clause does not even apply to these glass repair claims.

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Although not controlling, the Supreme Court considers the following reasons when determining whether to grant certiorari:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

Petitioner does not cite to any novel questions of law, any dissent in the Court of Appeals – the decision here and the decision in *Kemper* were both unanimous – any substantial constitutional issues, or a federal question. It appears Petitioner claims that the Court of Appeals' decisions in *Kemper* and here are somehow in conflict with *dicta* in this Court's decision in *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013). However, as discussed below, there is no such conflict. Instead, the holding here complies with the statutory scheme developed by the General Assembly in South Carolina Code Section 38-57-75. Therefore, Respondent Grange asks this Court to deny certiorari.

ARGUMENT

I. Consistent with *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 the work constituted acceptance of the unilateral contract at the price stated by Grange.

When 20/20 performed the work after Grange clearly communicated an offer to pay 20/20 for the work, 20/20 entered into a unilateral contract with Grange. The Court of Appeals correctly applied its prior precedent from *Kemper* in finding a unilateral contract here.

The holding in *Kemper* conforms to the now-codified process enacted in South Carolina Code § 38-57-75. Moreover, the Court of Appeals' holding in *Kemper* follows similar holdings by appellate courts in North Carolina, Washington, and Idaho. Because the Court of Appeals' holding comports with South Carolina Code § 38-57-75 and applies well-established rules of contract law, its ruling should not be disturbed.

A. The transaction in this case is identical to the transaction at issue in *Kemper*.

"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)). Under South Carolina law, a valid offer "identifies the bargained for exchange and creates a power of acceptance in the offeree." *Saunder v. Public 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 156-66 (citation omitted).

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.

In *Kemper* – as here – the glass repair shop and the insured participated in a three-way call with the third-party administrator, Safelite Solutions. 399 S.C. at 487, 732 S.E.2d at 207. In *Kemper* – as here – the insurer had previously notified the glass repair shop of its rates and pricing. *Id.* After the three-way call during which the third-party administrator stated how much the insurer was willing to pay, the third-party administrator faxed a referral sheet, reiterating the pricing. *Id.* at 488, 732 S.E.d at 207. The referral sheet stated, "Performance of services constitutes acceptance of the communicated price and billing instructions" – the same language included in the Grange referral sheet here. *Id.* After receiving the pricing generally before the claim, specifically during the call, and then in writing in the referral sheet, the glass repair shop performed the work and billed the insurer. The Court of Appeals in *Kemper* found the glass repair shop's performance of the work after receiving a clear offer from the insurer constituted acceptance of a unilateral contract, satisfying all three necessary elements to form the contract.

The first and second elements of a unilateral contract – a specific offer and communication of that offer – were satisfied in *Kemper* and here by communication of a clear offer by the offeror to the offeree. In *Kemper*, the Court of Appeals quoted favorably from the North Carolina Court of Appeals' decision in *CIM Ins. Corp.*, dealing with communication of an offer for a unilateral contract and identified the many ways in which the insurance company in *CIM Ins. Corp.* communicated the amount it was willing to pay:

> 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. (R. pp. 10-11, ¶ 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. (R. pp. 10-11, ¶ 7).[3] Thus, as in *Kemper*, the first and second requirements for a unilateral contract were satisfied.

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.[4] In *Kemper*, the Court of Appeals held that the glass repair shop's performance of 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. As detailed above, the same transaction occurred here.

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[3] 20/20 argues that there was no meeting of the minds. For a unilateral contract, all that is required is a clear offer communicated to the offeree. If, after receiving the clear offer, the offeree performs, then the contract is formed. 20/20 admits that it clearly understood the pricing and rates communicated by Grange. (R. p. 11, ¶ 7). Therefore, the offer was clearly made and communicated, and the contract was formed when 20/20 performed the repairs.

[4] It is worth reiterating that 20/20 performs this work after Grange sends the referral sheet communicating the price and stating that performance constitutes acceptance and after 20/20 has already guaranteed the insured that he or she will not have to pay anything out of pocket. 20/20 argues that it was performing the work for more than Grange offered when it had already promised the insured not to seek any additional amount from the insured. The insured never agreed to pay any money more than what Grange offered, so it is not plausible that 20/20 believed it was performing the work for any amount other than what Grange specifically offered.

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 concedes that the offer was unambiguous. (R. p. 95, ¶¶ 28 & 31, p. 97, ¶ 44, p. 98, ¶ 49, p. 52, ¶ 52, p. 101, ¶ 65, p. 102, ¶¶ 76-77, p. 105, ¶ 101). After receiving a clear offer that was communicated to 20/20, 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 its prior holding in *Kemper* by finding Grange's payment of the offered price after 20/20 performed the work satisfied Grange's contractual obligations.

B. The holding in *Kemper* follows similar holdings by appellate courts in North Carolina, Washington, and Idaho, and its result conforms to the requirements of South Carolina Code Section 38-57-75.

The Court of Appeals decision in *Kemper* was filed on August 15, 2012. On January 1, 2013, South Carolina Code Section 38-57-75 became law. Petitioner contends that this statute somehow changes the holding in *Kemper*. To the contrary, the statute codifies the very transactions that were approved in *Kemper* and in this case.

In addition to conforming with the requirements of § 38-57-75, the Court of Appeals' decisions in *Kemper* and here were not formed from whole cloth. Instead, the decisions applied traditional principles of contract law. Moreover, the Court of Appeals in *Kemper* thoroughly analyzed caselaw from other jurisdictions addressing this issue and relied upon the analysis provided by the North Carolina Court of Appeals in *CIM Ins. Corp.*, the Washington Court of Appeals in *Cascade Auto Glass, Inc.*,[5] and the Supreme Court of Idaho in *Idaho Farm Bureau.*[6]

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[5] *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wash. App. 670, 145 P.3d 1253 (2006).

[6] *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 115 P.3d 751 (2005).

The three-way call fully complied with the framework established by § 38-57-75. By statute, the insurer and the insurer's third-party administrator must not require a vehicle to be repaired by a particular glass repair shop. S.C. Code § 38-57-75 (A). Also, the third-party administrator must inform the insured that it is acting on behalf of the insurer. S.C. Code § 38-57-75(B). Those steps took place here. (R. p. 97, ¶ 40) ("During each of these phone calls, the claims representative advised each Claimant that Safelite is the third-party administrator acting on behalf of Grange."). Also, the third-party administrator did not tell the insured that he or she could not use 20/20 for the repairs.

After verifying coverage under the policy, the third-party administrator must ask whether the insured has a provider of choice. S.C. Code § 38-57-75(C). If the insured requests that the work be performed by a non-network provider, then the insurer must follow the steps set out in § 38-57-75(E):

> (E) 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 or preferred provider list, the insurer or third party administrator:
>
> (1) must confirm that the provider agrees to perform the repair at the insurer's fair and reasonable rate of reimbursement. ***If the provider refuses to accept the rate, the insurer or third party administrator may inform the insured that he will be responsible for additional costs.*** If the provider agrees to accept the fair and reasonable rates, no further statements regarding costs shall occur and the provider must be paid the agreed upon fair and reasonable rate of reimbursement;
>
> (2) must inform the insured that he or she may use the requested provider of choice; and
>
> (3) must not make statements regarding the warranty offered by the provider of choice. . . .

S.C. Code § 38-57-75(E) (emphasis added). Thus, an insured maintains the right to get his or her windshield repaired wherever he or she chooses. If the insured selects a non-network repair shop

that does not accept the insurer's fair and reasonable rate of reimbursement, then the General Assembly has chosen to allow the insurer to inform the insured that he or she will be responsible for the difference in price.

That is exactly what took place here and in *Kemper*. In each instance, the insured, 20/20, and a Grange representative participated in a three-way call. Grange asked the insured if he or she had chosen a glass shop to perform repairs, and the insured stated he or she had chosen 20/20. (R. p. 97, ¶¶ 42-43). Grange then advised the insured and 20/20 of the pricing or rates that Grange was willing to pay for the job. (R. p. 97, ¶ 44). 20/20 then informed Grange that it rejected the price, but it also guaranteed to the insured that he or she would have no out of pocket expenses. (R. p. 97, ¶ 44).

As a result, Grange informed the insured that he or she had a right to use a glass company of their choice and that Grange had established pricing with other glass shops in the area that Grange considered to be fair and reasonable – prices that 115 shops in South Carolina accepted – and that the insured may be responsible to pay for any additional amounts charged by 20/20 in excess of what Grange was willing to pay– despite the fact that the insured had already been guaranteed by 20/20 that he or she would not have to pay any amount above what Grange was willing to pay. (R. pp. 97-98, ¶ 46). Thus, Grange satisfied every requirement of § 38-57-75(E).

The Court of Appeals' holding in *Kemper* and § 38-57-75 are in harmony. Section 38-57-75 allows the insured the freedom to select whatever glass repair shop he or she wishes – a right that the *Kemper* court never challenged. Under the statute, if the insured selects a non-network shop that will not accept the insurer's rates – which are accepted by network shops – then the insured must be informed that he or she is responsible for the difference. Nothing in § 38-57-75 is inconsistent with the Court of Appeals' holding in *Kemper*.

In fact, in *Kemper*, the Court of Appeals cited from the Supreme Court of Idaho's analysis in *Idaho Farm Bureau*, and specifically acknowledged that the glass company has three options: (1) do the work at the accepted rate; (2) accept the insurance payment and collect the rest from the insured; or (3) refuse to perform services for the insurer and require the insured to pay for the work and then seek recovery from the insurer. 399 S.C. at 493, 732 S.E.2d at 210 (quoting *Idaho Farm Bureau Ins. Co.*, 115 P.3d at 755).

In *Kemper*, in *Idaho Farm Bureau*, and here, the glass repair shop chose the first option – do the work at the offered rate. 20/20 has already admitted it guaranteed to the insured before it did the work that the insured would not have to pay anything out of pocket. Therefore, 20/20 clearly chose not to pursue the second or third options.[7]

20/20 argues that it could not have entered into a unilateral contact because it expressly rejected Grange's price before performing the work. However, the Court of Appeals in *Kemper* held it is a party's *conduct* that constitutes acceptance of a unilateral contract, not its *words*. *Kemper*, 399 S.C. at 498, 732 S.E.2d at 213 (holding admission of a transcript of the telephone conversation was not prejudicial at the summary judgment stage because "a unilateral contract was created by Southern Glass's *performing* the work on Kemper's insureds, not by Southern Glass's verbal response.") (emphasis in original).

These principles are exemplified in the classic unilateral contract example. If a homeowner offers to pay a painter $50 to paint his house, the painter cannot reject the price, paint the house,

[7] Had 20/20 chosen options two or three, the insureds would likely have chosen to have one of the 115 glass repair shops in South Carolina who performed work at Grange's rates do the work. The insured can choose whatever glass repair shop he or she wishes, but the insured is unlikely to choose one that would charge the insured more than what the insurance company would pay, especially when there are 115 other shops in the state willing to accept Grange's rate.

and then expect to be paid more than $50. His conduct in painting the house constitutes acceptance of the contract at the offered rate.

Likewise, the Washington Court of Appeals found a unilateral contract under similar facts in *Cascade Auto Glass, Inc.* In that case – as here and as in *Kemper* – the third-party administrator sent notices to the glass repair shop of its new pricing. The glass repair shop performed glass repair services, obtained an assignment from the insured, and then attempted to bill the insurer for more than the insurer agreed to pay. The Supreme Court held:

> 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. 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 amount it promised to pay in the superseding letters; Cascade is entitled to no more than those amounts.

135 Wash. App. at 769, 145 P.3d at 1257-58. Like the transaction in *Cascade Auto Glass*, 20/20 performed the work after Grange communicated the amount it was willing to pay. Thus, 20/20 entered into a unilateral contract with Grange at Grange's offered price.

Because the transaction here complied with § 38-57-75 and mirrors the transaction at issue in *Kemper*, the Circuit Court and Court of Appeals correctly held that Grange complied with the statute and that 20/20 entered into a unilateral contract with Grange. 20/20 performed the glass repair work after Grange clearly communicated the amount it was willing to pay for the work, in writing, and after Grange stated in writing that performance of the work constituted acceptance of Grange's price. The Court of Appeals' holding comports with findings by other courts, and it should not be disturbed.

II. Because the Circuit Court and Court of Appeals did not rely on the validity of the purported assignment, Petitioner's reliance on *Narruhn* is misplaced.

Petitioner argues that the law of this State changed when this Court rendered its decision in *Narruhn*. In *dicta*, this Court in *Narruhn* stated, "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." *Narruhn*, 404 S.C. at 344, 745 S.E.2d at 93-94 (emphasis in original) (citations omitted).

This *dicta* in *Narruhn* has no relevance or bearing to this case. Neither the Circuit Court nor the Court of Appeals based its decision on whether the assignment was enforceable.[8] Instead, the Circuit Court and Court of Appeals held that, regardless of any assignment, 20/20 entered into a unilateral contract with Grange when it performed the glass repair services after Grange clearly communicated the offered price for the work. Because the courts below never held that the post-loss assignment was valid or invalid – because such a ruling is unnecessary in this case – Petitioner's reliance on *Narruhn* is misplaced.

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[8] Ironically, Petitioner argues that the unilateral contract between Grange and 20/20 lacks consideration, but the facts in this case show that it is actually the purported assignment from the insured to 20/20 that lacked any consideration. Before 20/20 performed the work, it guaranteed the insured that he or she would not have to pay anything out of pocket for the repair services. Then, only after performing the work, 20/20 had the insured sign the Work Order with the purported assignment. Then, using the assignment, 20/20 claims that it can somehow seek recovery from Grange for more than what Grange agreed to pay because the insured was purportedly responsible for paying 20/20 the difference. However, the insured never agreed to pay anything more than what Grange was willing to pay. As an assignee, 20/20 stands in no better shoes than the assignor insured. *Chet Adams Co. v. James F. Pedersen Co.*, 308 S.C. 410, 413, 418 S.E.2d 337, 338 (Ct. App. 1992) ("Generally, the assignee of a non-negotiable chose in action takes it subject to all equities and defenses which could have been set up against the assignor at the time of the assignment."). Thus, to the extent 20/20 argues that the insured assigned a right to recover from Grange more than what Grange agreed to pay, the assignment is not supported by any consideration.

III. The contract between 20/20 and Grange was supported by a classic form of consideration – money.

The contract between 20/20 and Grange is supported by monetary consideration. Grange promised to pay a certain amount if 20/20 performed the work, and Grange informed 20/20 that performance constituted acceptance. Money is a universally recognized form of consideration. "Take for instance, the classic textbook example of a unilateral contract: 'I will pay you $50 if you paint my house." *Vanegas v. American Energy Servs.*, 302 S.W.3d 299, 303 (Tex. 2009). "The 'classic' unilateral contract is one in which one party promises to pay another party for services or a product which the other party may supply at his discretion." *Klamen v. Genuine Parts Co.*, 848 S.W.2d 38, 40 (Mo. Ct. App. 1993). Thus, the contract was supported by consideration.

To avoid the obvious presence of consideration, 20/20 contends that Grange cannot use money that it is obligated to pay on behalf of its insured as consideration to support a contract with 20/20. In order to protect parties to a contract, the law has long recognized: "A promise by a party to do that which it has already legally obligated itself to do is not a valid consideration." *City of Spartanburg v. Spartan Villa*, 273 S.C. 1, 5, 253 S.E.2d 501, 503 (1978). This rule prevents one party from forcing a change in the terms of a **pre-existing** contract with another party to that contract by threatening not to perform unless the other party agrees to the modification. That is what this Court addressed in *Spartan Villa*, and Grange does not dispute this well-settled principle of law. However, this principle only applies to efforts to change the terms of an **existing** contract between two parties. 20/20 misconstrues this rule and attempts to argue that it should apply when two parties who do not have a pre-existing contract enter into a contract. That is not the law.

In *Spartan Villa*, the City of Spartanburg entered into an agreement with Spartan Villa for the City to provide a sewer tap permit for $1,500. *Spartan Villa*, 273 S.C. at 3, 253 S.E.2d at 501. Then, the City unilaterally tried to increase the fee to $30,150. *Id.* at 4, 253 S.E.2d at 501. The

City claimed it entered into a new contract with Spartan Villa when it sent a new letter informing Spartan Villa that the original sewer tap was only temporary and the City required Spartan Villa to sign the letter. Finding that the parties had already entered into a binding contract for $1,500, this Court held that there was no consideration for the City's attempt to change the sewer tap to a temporary tap and its attempt to charge more for the tap later. *Id.*; *see also Castell v. Stephenson Finance Co.*, 244 S.C. 45, 135 S.E.2d 311 (1964) (involving another attempt by one party to a contract to change the terms of a pre-existing contract with another party to the same contract).[9]

Unlike the facts at issue in *Spartan Villa* and *Castell*, there was no pre-existing contract between 20/20 and Grange when 20/20 performed the glass repair service and entered into a unilateral contract with Grange. Before 20/20 performed the work, Grange had no contract with 20/20, and it had no obligation to pay 20/20. Thus, the offer to pay money to 20/20 constituted consideration sufficient to support a separate contract with 20/20.

Likewise, Grange did not attempt to change the contract between Grange and its insureds. Under the terms of the contact, Grange reserved the right, at its option, to pay for repair services:

> **Payment of Loss**
>
> **We** may, at **our** option, pay to repair or replace the damaged or stolen property.

(R. p. 133). Thus, Grange had the option of paying for the repair of the glass, which is exactly what Grange did. As was its right under the contract between Grange and its insured, Grange entered into a contract with 20/20 to perform the glass repair services at Grange's price. 20/20

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[9] 20/20's citation to *McLeod v. Sandy Island Corp.*, 265 S.C. 1, 256 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.

could have refused to enter into the contract by not performing the work. It did not. Instead, it did the work.[10]

A duty owed under one contract routinely serves as consideration for another contact. When a general contractor enters into a contract with a property owner to construct a property, the general contractor routinely promises the owner that the general contractor will pay any sub-contractors hired to perform the work. Then, the general contractor enters into contracts with sub-contractors to perform parts of the work. No one would argue that the sub-contract between the general contractor and the sub-contractor was not supported by valid consideration merely because the general contractor was already obligated to pay sub-contractors for the work.

Likewise, suppose a landowner promises: if you manage my land for the entire year, I will buy you a new Ford F150 and have it delivered to your house. Upon completion of the manager's performance, the landowner enters into a contract with a car dealership to purchase the Ford F150 and have it delivered to the land manager. If the dealership fails to deliver the Ford F150 to the manager, then the landowner may pursue the dealership for breach of contract. The contract between the landowner and the dealership is supported by the money the landowner pays for the Ford F150. It would not be any defense for the dealership to argue that the sale was not supported by consideration because the landowner had a contractual obligation to purchase the truck under a

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[10] As discussed above, 20/20 could have chosen to enter into a separate contract with Grange's insured for more than what Grange agreed to pay and pursued payment from Grange's insured. This was an option recognized by the Court of Appeals in *Kemper* and the Supreme Court of Idaho in *Idaho Farm Bureau*. *Idaho Farm Bureau*, 141 Idaho at 664, 115 P.3d at 755 (holding the glass repair shop could: (1) perform the work at the agreed upon price; (2) accept the insurance payment and collect the difference from the insured; or (3) collect from the insured, leaving the insured to recover from his or her insurer); *Kemper*, 399 S.C. at 493, 732 S.E.2d at 210 (citing with approval from *Idaho Farm Bureau*). However, 20/20 guaranteed the insured would owe nothing. (R. p. 97, ¶ 45). Thus, 20/20 chose not to enter into a separate contract with the insured.

separate contract with a separate person.[11] Moreover, the land manager could pursue the landowner for failing to have the truck delivered as promised. Two contracts exist, and both contracts are supported by consideration and have been breached.

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 – like the land manager in the above example – could pursue Grange for failing to satisfy its obligations under the policy because Grange neither paid its insured nor paid to have the repairs performed. In turn, Grange could sue 20/20 – like the landowner with the dealership – for failing to perform the repairs that were promised. Both contracts are enforceable.

Instead of entering into a bilateral contract, Grange chose to pay to repair the glass, which was its right under the contract with its insured, and made a unilateral offer to 20/20. When 20/20 performed the work, 20/20 entered into a contract with Grange, obligating Grange to pay the amount offered. When Grange paid 20/20, Grange simultaneously satisfied its obligation to its insured – it paid for repair of the glass – and its obligation to 20/20 – it paid the contractual amount. Thus, the contract is supported by consideration.

CONCLUSION

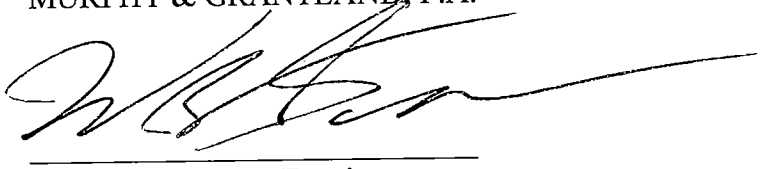
Two Circuit Court Judges and five Court of Appeals judges in this state have unanimously found that a unilateral contract is created when an insurer communicates an offer to pay a specific amount to a glass repair shop if the repair shop performs glass repair services and the glass repair

[11] Perhaps because there is no authority to the contrary, Petitioner 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 case in Minnesota. (Pet. p. 13). There is no legal analysis or supporting case law to support the holding.

shop performs the repairs.[12] The process established by the General Assembly in § 38-57-75 ratified by statute the process that took place in *Kemper* and here. This case does not involve any novel issues of law, dissent, conflicting decision of this Court, federal question, or constitutional issues. Therefore, Grange respectfully asks this Court to deny the Petition for Certiorari.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
Ronald B. Diegel, Esquire
S.C. Bar No. 65076
PO Box 6648
Columbia, South Carolina 29260
(804) 782-4100
wsawyer@murphygrantland.com
rbdiegel@murphygrantland.com
Attorneys for Respondents Grange Mutual Casualty and Trustguard Insurance Company

Columbia, South Carolina
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[12] Judge Geathers was on the panel in both *Kemper* and here.