THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2020-000462

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

v.

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

BRIEF OF APPELLANT 20/20 AUTO GLASS, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Whether this Court's decision in *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E. 2d, 90 (S.C. 2013) and the legislature's enactment of SC Code § 38-57-75 alleged the legal landscape for unilateral contracts in auto glass repair and replacement subsequent to the court of appeals decision in *Southern Glass & Plastics v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (S.C. Ct. App. 2012).

2. Whether a unilateral contract was formed despite 20/20 expressly rejecting Grange's offer and there was no meeting of the minds between Grange and 20/20.

3. Whether a unilateral contract was formed when Grange only offered to do what it was contractually obligated to do under the insurance policy, and then paid an amount different than what it initially offered.

STATEMENT OF THE CASE

This case comes to this Court on a writ of certiorari review of an unpublished opinion of the court of appeals affirming the judgment of the Anderson County Court of Common Pleas, Hon. R. Scott Sprouse presiding. On August 21, 2014, Grange Mutual Casualty and Trustgard Insurance Company commenced the declaratory judgment action below against 20/20 Auto Glass, LLC, after 20/20 invoked an appraisal remedy to resolve disputes over reimbursements of a handful of claims for replacement of broken automobile glass.

On October 26, 2016, the matter was tried to the court below on stipulated facts. On December 6, 2016, the trial court entered its order for judgment for the insurers and against 20/20 declaring that 20/20 was contractually bound to the insurers' reimbursement rates because it accepted those rates when it performed the work and created a unilateral contract with the insurers, that 20/20 was not underpaid and the insurers owed 20/20 nothing further on the glass claims at issue, that the insurers did not breach their insurance policies and that the insurers were not obligated to participate in the appraisal process as demanded by 20/20. On December 16, 2016, 20/20 moved the trial court to alter, amend or reconsider its order. The court denied that motion and 20/20 received written notice of entry of the order on January 18, 2017. On February 10, 2017, 20/20 served its notice of appeal. The court of appeals affirmed the judgment of the circuit court. *Grange Mutual Casualty and Trustguard Insurance Company v. 20/20 Auto Glass*, LLC, Op. No. 2019-UP-419 (S.C. Ct. App. Filed December 31, 2019). On January 15, 2020, 20/20 petitioned the court of appeals to reconsider its order. The court of appeals denied 20/20's motion by an order dated February 10, 2020. 20/20 then filed its petition for writ of certiorari with this Court, which was granted on November 25, 2020.

STANDARD OF REVIEW

This Court reviews all the issues *de novo* and gives no deference to the trial court's legal conclusions because this case was tried on stipulated facts. *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (S.C. 2000) ("When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts"); *J.K. Constr. Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (S.C. 1999) (where an appeal arises on stipulated facts, "the appellate court owes no particular deference to the trial court's legal conclusions.").

FACTUAL BACKGROUND

This is a dispute over how Grange Mutual and Trustgard Insurance reimburse 20/20 Auto Glass for claims arising out of the replacement of broken automobile glass. Although there is a contract which specifies both the insurers' reimbursement obligation and the mechanism by which disputes are to be resolved – the insurance policies issued by Grange and Trustgard[1] – the insurers in this instance sought to bind 20/20 to a process not contemplated by the insurance contracts.

The facts underlying the appeal were stipulated to by the parties and are not in dispute. R. pp. 90-179. 20/20 Auto Glass is a small South Carolina limited

[1] For the remainder of this brief, the respondents will be referred to as Grange.

liability company in the business of repairing and replacing damaged automobile glass. R. p. 91 Stipulated Facts ¶ 2. For customers with insurance coverage for damaged glass, 20/20 receives an assignment of the insurance proceeds owed by the insurance company as payment by the customer for the work performed. R. p. 96 Stipulated Facts ¶ 35-36. 20/20 then bills and collects from the insurance company directly. *See, e.g.*, R. p. 99 Stipulated Facts ¶¶ 56-57. That is exactly what occurred in each claim at issue in this case. R. pp. 98-105 Stipulated Facts ¶¶ 49-100.

As part of the process, 20/20 and its customer, the Grange policyholder, notify Grange of the claim by contacting Safelite Solutions, Grange's third-party claims administrator. R. p. 94, 91; Stipulated Facts ¶¶ 25, 6. During the telephone call where the report was made, Safelite, on Grange's behalf, asked the customer whether they had chosen a glass shop to perform the repairs; for all claims here the customer chose 20/20 Auto Glass. R. p. 97; Stipulated Facts ¶¶ 42-43. The Safelite representative also proposed pricing to 20/20 for the glass replacement work. R. p. 97; Stipulated Facts ¶ 44. 20/20 expressly rejected pricing it found to be unreasonable. R. p. 94, 95; Stipulated Facts ¶¶ 26, 32. The Safelite representative then, among other things, told the customer that the customer may be responsible for additional amounts charged by 20/20 over what Grange is willing to pay. R. pp. 97-98; Stipulated Facts ¶ 46. 20/20 assured the customer

there would be no out-of-pocket expense to the customer. R. p. 97; Stipulated Facts ¶ 45. During the calls, each customer indicated their understanding of the terms and chose to proceed with 20/20 to replace the auto glass. R. p. 98; Stipulated Facts ¶ 47.

In addition to rejecting the pricing Safelite offered on Grange's behalf during the phone call, 20/20 had previously sent a letter to Safelite, stating specifically that 20/20 rejected any effort by Safelite to set prices and that all future offers of pricing were rejected absent a written agreement signed by someone acting for 20/20. R. pp. 95, 145; Stipulated Facts ¶ 32, Exhibit C. The letter further noted that the rejection of Safelite's rates would be documented by the invoices ultimately submitted by 20/20 for the glass repair or replacement work performed.

Although 20/20 rejected the pricing both in writing and verbally over the telephone when the claim was reported, Safelite on Grange's behalf, faxed a claim confirmation/referral sheet to 20/20 for each claim which again set forth the pricing Grange sought to pay for the work. R. pp. 95-96, 147, 160, 168; Stipulated Facts ¶ 33, Exhibits D, J and N. The referral sheets, however, contained contradictory information about pricing. On the one hand, they stated that "Performance of the services constitutes acceptance of the communicated price and billing instructions." *See, e.g.*, R. p. 147; Stipulated Facts Exhibit D. On the other,

they indicated that if the cost of the claim would exceed $1,000 – the quoted price on every claim in dispute in this case was always less than $1,000 – then approval needed to be obtained from Safelite. *See, e.g.*, R. p. 147; Stipulated Facts Exhibit D. The referral sheets also indicated that the glass shop should contact Safelite, Grange's third-party administrator for, among other things, "other charges." *Id.* That language is curious because had the price been intended to be binding as Grange has asserted here, there would be no "other charges" and it would not be possible for the claim to exceed $1,000.

20/20 then performs the replacement work for its customer. Instead of accepting Grange's pricing offer, 20/20 received payment from its customer by the customer executing an assignment of the insurance proceeds owed by Grange to the customer. R. p. 96; Stipulated Facts ¶35-36. Significantly, the insurance coverage at issue is property damage insurance, it is not a reimbursement insurance. The insurance company owes a debt to the policyholder immediately upon the damage being sustained, whether the damage is ever repaired. The policyholder, 20/20's customer, transfers that debt to 20/20 via the assignment as payment for the work performed. 20/20 then submits its invoice for the work to Grange. In each instance at issue here, 20/20 did not comply with either the billing instructions or the pricing provided by Grange in the confirmation documents. The

submission of the invoice was the one and only way 20/20 notified Grange that the work had been performed.

The existence and validity of the assignments is not in dispute. Grange paid 20/20 directly in accordance with the assignment of proceeds. R. pp. 99, 101, 103, 104, and 105 Stipulated Facts ¶¶ 57, 71, 83, 87, 93, and 98. The dispute arises because Grange paid less than the amount invoiced.[2] Subsequent to trying to resolve the dispute by sending follow up invoices, *see, e.g.*, R. pp. 100, 155-56 Stipulated Facts ¶¶ 59-60 and Exh. H, 20/20 sent a demand to appraise the loss to resolve the dispute. *See, e.g.*, R. pp. 100, 158 Stipulated Facts ¶ 61, Exh. I. Grange responded to the demands for appraisal by commencing the action underlying this appeal.

ARGUMENT

The issues before this Court revolve around the finding that a unilateral contract was created when 20/20 replaced its customers' damaged automobile glass. There were multiple issues associated with the underlying action that are not at presented in this appeal; the trial court resolved those issues when it determined that a unilateral contract was created. *See* Trial Court Order, Conclusions of Law ¶¶ 8-11. In essence, once it was determined that there was a unilateral contract, that conclusion resolved whether Grange fulfilled its contractual obligations to its

[2] For the remainder of this brief, the respondents will be referred to as Grange.

policyholders and whether 20/20 had any ability to demand an appraisal. As a result, reversal by this Court requires that the case be remanded to the trial court to address the merits of the remaining issues presented by the declaratory judgment action and the counterclaim.

1. **This Court's 2013 decision in *Narruhn v. Alea London Ltd.* and the legislature's enactment of S.C. Code § 38-57-75 in 2013 makes creation of a unilateral contract on these facts impossible as a matter of law.**

The reliance by the courts below on a decision of the South Carolina Court of Appeals from 2012, ignoring subsequent developments in both the jurisprudence of this state and the South Carolina Code, constitutes manifest error and requires reversal. The trial court relied nearly exclusively on *Southern Glass & Plastics v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (S.C. App. 2012), in concluding that the conduct of the parties created a binding unilateral contract that precluded 20/20 from seeking an amount beyond what Grange paid on each of the subject claims. The trial court, however, failed to analyze the impact of this Court's opinion in *Narruhn v. Alea London Ltd.*, 404 S.C 337, 745 S.E.2d 90 (S.C. 2013), decided after *Southern Glass*, and further failed to address how the legislature's adoption of S.C. Code § 38-57-75, enacted after *Southern Glass*, affected Grange's ability to assert the existence of a unilateral contract. Both developments clarify that Grange is precluded as a matter of law from asserting that a unilateral contract exists in this case.

The underlying premise of Grange's position is relatively simple: its agent, Safelite, communicates to 20/20 the amount that Grange desires to pay for replacement of damaged automobile glass and includes within the written communication of that proposed reimbursement rate language, indicating that 20/20's performance of the work constitutes acceptance of Grange's proposed pricing. In Grange's view, if 20/20 does not agree with that pricing, 20/20's only option is to refuse to do the work. While there are several issues with that analysis that will be discussed below, the underlying law in South Carolina, at least as of 2013, eviscerates Grange's position because 20/20 can avoid the unilateral contract by means other than simply refusing to do the work.

In *Narruhn*, this Court made clear that policyholders have the unfettered ability, post-loss, to assign the policy proceeds owed without interference by the insurance company. Specifically, the Court wrote:

> As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy ... after a loss has occurred.... It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.

Narruhn., 404 S.C. at 344, 745 S.E.2d at 94 (quoting *Williston on Contracts* § 49:126 (4th ed. 2000)).

Narruhn is important to this case in three ways: First, it unequivocally establishes that the claim vests at the time of loss; in other words, Grange owes its

policyholders a debt as soon as the insured property – in this case, the vehicle's glass – is damaged. Second, it unequivocally allows the policyholder to assign or sell the claim/debt "like any other chose in action or piece of property." Here, *Narruhn* permits 20/20's customers, who are Grange insureds, to pay 20/20 for its glass replacement services by assigning the debts they are owed by Grange in the same way that the customers could pay with cash, check, credit card or anything else of value that 20/20 would be willing to accept. Third, *Narruhn* also stands for the proposition that insurers like Grange cannot interfere with that assignment. In doing so, *Narruhn* makes it impossible for an insurer to claim that it can pay to an assignee like 20/20 something other than the full amount of the debt owed to the policyholder.

Standing alone, *Narruhn* requires reversal of the decisions below. It is not, however, the solitary legal basis for 20/20's argument. The legislature enacted several provisions within S.C. Code § 38-57-75 that further negate any claim of a unilateral contract being created here. Specifically, section 38-57-75(A) legislatively protects a consumer's right to select a glass replacement facility to perform the service on the consumer's vehicle: "When an insured has suffered damage to the glass of a motor vehicle, 'vehicle glass,' both the insurer providing glass coverage and the third party administrator that administers glass coverage for that insurer must not require that repairs be made to the insured's vehicle by a

particular provider of glass repair work." Protecting the right to choose a glass service provider is reiterated in section 38-57-75 (E)(2): The insurer or third party administrator "must inform the insured that he or she may use the requested provider of choice...."

The statute expressly permits glass replacement service providers, like 20/20, to reject insurance company proposed pricing and not be bound by that pricing upon performance of the work. Specifically, the statute states:

> When an insured requests to have covered glass repair work performed by a provider of choice 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 fair and reasonable rate of reimbursement.

S.C. Code 38-57-75(E)(1) (emphasis added). If insurers could bind glass replacement companies to the insurers' rates of reimbursement as Grange attempted to do to 20/20 here, there would be no need for this provision in the statute; glass companies could not refuse to accept the insurers' rates and there would never be a need to inform the policyholder of any potential personal liability.

In the present case, the parties' conduct tracked *Narruhn* and the code until Grange sought to claim the existence of unilateral contracts. The damage to the windshield occurred before the insured contacted 20/20 or Grange. The debt owed under the policy vested when the windshield was damaged; the amount due under the insurance policy and the debt owed by Grange was fixed at that point in time. The customer assigned its insurance proceeds to 20/20, a glass company of its choosing, in exchange for work. R. pp. 96-97; Stipulated Facts ¶¶ 35-36 and 42-43. Grange, which cannot object to the company the customer chose, informed the customer they may be responsible for additional amounts charged by 20/20. R. pp. 97-98; Stipulated Facts ¶ 46. Last, 20/20 rejected Grange's pricing and performed the replacement. R. pp. 94, 95; Stipulated Facts ¶¶ 26, 32.

Grange's entire unilateral contract argument focuses on events that happen after the damage occurred and the claim vested. These events are irrelevant to the insured's ability to assign its claim to 20/20 in exchange for 20/20 to repair the insured's windshield. Grange's attempt to reduce a debt owed under its insurance policy that has already vested is an effort to prevent the assignment of the debt, the chose in action, which is plainly not permitted in South Carolina after *Narruhn*.

To conclude that following the procedure in the statutes still establishes a unilateral contract would permit Grange to offer pricing knowing that 20/20 would never accept it as a way of circumventing the statutorily protected consumer

choice, and allow Grange to create a barrier to transferring the chose in action that this Court plainly held is impermissible, rendering the statute meaningless. In short, *Southern Glass*, and the courts' decisions below relying on *Southern Glass*, cannot be squared with this Court's decision in *Narruhn* and the enactment of S.C. Code § 38-57-75.

To put it another way, in this situation, 20/20 has two competing offers available to it for payment for its services. On one side is the offer from the insurer to be paid at a particular price – an offer 20/20 expressly and repeatedly rejected. R. pp. 94-95, 145; Stipulated Facts ¶ 26, 32, Exhibit C. On the other side is the offer from the customer, Grange's policyholder, to pay 20/20 by assigning the full amount of the policy proceeds owed by Grange. 20/20 absolutely may reject Grange's offer and accept the offer from the customer without Grange interfering in that bargain. 20/20 could have agreed to Grange's pricing but it did not as the legislature anticipated may occur. S.C. Code. §38-57-75(E)(1). The ability of customers to assign their vested claims cannot be restricted by the insurer according to *Narruhn*. That is exactly what Grange is attempting in this instance and what the courts below, contrary to *Narruhn*, allowed.

Applying the case law governing the validity of post-loss assignments of insurance proceeds and the code provisions granting consumers the right to choose auto glass service providers as well as permitting those providers to expressly

reject pricing offered by insurers makes it legally impossible for Grange to successfully claim that a unilateral contract was formed when 20/20 performed replacement services for its customers. Because the court of appeals affirmed the trial court's legally erroneous conclusion that unilateral contracts existed in this instance, that decision must be reversed and the matter remanded to the trial court.

2. A unilateral contract could not be created because 20/20 did not accept Grange's offer and there was no meeting of the minds.

Setting aside the issues associated with the assignment of the insurance proceeds and the code provisions applicable to this dispute, there was no contract created because the facts do not satisfy South Carolina law on contract formation. The lower courts' decisions ignore basic contract principles established by this Court regarding the importance of acceptance and the meeting of the minds for the creation of contracts. *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364 247 S.E.2d 434, 436 (S.C. 1978) ("it is evident that the conversations between these parties do not amount to the formation of a contract. The parties never had a meeting of the minds as to any of the essential terms and their testimony shows affirmatively that there was no contract."); *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (S.C. 1989) *citing Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (S.C. 1975) ("there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement"); and *Lee v. Travelers' Ins. Co. Of Hartford*, 173 S.C. 185, 175 S.E. 429, 433 (S.C. 1934) ("A contract is an

agreement between two or more parties, the preliminary step in the making of which is the offer by one party and the acceptance by the other, in which the minds of the two parties meet and concur in the understanding of the terms.")

The concept that an offer can be accepted by performance is well recognized in South Carolina and elsewhere. *See, e.g., Sauner v. Public Serv. Auth.*, 354 S.C. 397, 406, 581 S.E.2d 161, 165-66 (S.C. 2003) (internal citation omitted) ("A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance.". That acceptance, however, can be limited in two circumstances, both of which are present here. In addressing what the trial court called a unilateral contract – a contract that invites acceptance by performance – the Restatement (Second) of Contracts provides that "Except as stated in § 69, the rendering of performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance." Restatement (Second) of Contracts § 53(2); *U.S. ex rel. Am. Gen. Constr. v. Yack Constr., Inc.*, 2:17-cv-01994-MMD-CWH at 6-7 (D. Nev. 2019) (relying on Restatement (Second) of Contracts §53(2) to conclude that a subcontractor agreement was not accepted prior to performance). Similarly, the next subsection of the Restatement states: "Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute an

acceptance if before the offeror performs his promise the offeree manifests an intention not to accept." *Id.* 53(3).

In the present case, 20/20 did not accept Grange's offer and there was no meeting of the minds as to the terms of the agreements. Therefore, there was no contract. The stipulated facts demonstrate that 20/20 clearly and repeatedly informed Grange that it did not accept the proposed pricing. 20/20 did so before it performed the work and it did so again after it performed the work and before Grange tendered its payment to 20/20. 20/20 notified Grange, both directly and through Grange's third-party administrator, Safelite, that it was not accepting the proposed pricing and it did so (a) within a reasonable time and upon exercising reasonable diligence and (b) before Grange performed on its promise, issuing payment. In other words, the facts in this case show conclusively that performance did not constitute acceptance of the proposed pricing terms. These facts are fatal to Grange's claim that a contract was formed. When combined with the Restatement provisions there was no unilateral contract as a matter of law.

These series of events provide the conclusion that a unilateral contract was not created. First, 20/20 expressly rejected the pricing when it was offered on the telephone when the claim was reported by 20/20 and its customer to Grange through the third-party administrator, Safelite. R. pp. 94, 95, 97, 98; Stipulation of Facts ¶¶ 26, 32, 45, 49. Even before the work was done, before the confirmation

fax was sent, Grange was on notice that 20/20 was not accepting the proposed pricing.

Second, 20/20 notified Safelite in writing that 20/20 was not accepting the pricing laid out in the fax confirmations and does not negotiate pricing with claims administrators. R. p. 95, 145 Stipulation of Facts ¶ 32, Exhibit C. In that letter, 20/20 explicitly rejected any effort to bind the company to pricing:

> 20/20 Auto Glass has received your communication purporting to assign a glass replacement job to our company. Every aspect of the communication is rejected in its entirety. ...
>
> ...
>
> Third, we reject the pricing that is set forth in your communication. Given the totality of the circumstances, including the fact that you are a stranger to this transaction, you have no ability to bind either 20/20 Auto Glass or our customer to any pricing absent our express agreement. We have already verbally rejected the pricing when the claim was reported. We are further manifesting our rejection of the pricing in both this letter and in our invoice for this job. Absent a written agreement signed by an authorized representative of 20/20 Auto Glass, all future offers of pricing that are faxed to us are also rejected.

R. 145; Exhibit C.

Third, at the time that 20/20 notified Grange that 20/20 had completed the work on its customer's vehicle, 20/20 indicated that it did not accept the offer. The fax setting forth the "offer" specifies that "Performance of services constitutes acceptance of the communicated price and billing instructions." *See, e.g.*, R. pp. 147, 99 Exhibit D and Stipulation of Facts ¶ 53. The notification that the work was

performed – 20/20's submission of its invoice – complied with neither the communicated price nor the billing instructions. *See* R. p. 151; Exhibit F. 20/20 did not follow the instructions of the fax. Besides not billing Grange at the state rates, 20/20 did not have the customer sign either its invoice or the fax confirmation as it was instructed to do.

Any change in the terms of the offer by the offeree constitutes a rejection of the offer and amounts to a counteroffer. *Alpine Glass Inc. v. Ill. Farmers Ins. Co.*, 643 F.3d 659, 666 (8th Cir. 2011) quoting *Markmann v. H.A. Bruntjen Co.*, 249 Minn. 281, 81 N.W.2d 858, 862 (Minn. 1957)("If the purported acceptance changes the terms of the offer, 'it is not positive and unequivocal, and constitutes a rejection of the offer and a counteroffer.'"). There, the court determined that a glass company that did not follow the terms of the unilateral contract offer did not accept the offer by performance. The same principle applies here and is consistent with South Carolina Law. This Court has articulated this exact proposition:

> "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of an agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either."

Holliday v. Pegram, 94 S. C. 292, 77 S. E. 1014 (S.C. 1913) quoting *Eliason v. Henshaw*, 17 U.S. 225, 228 (1819)

That there was no meeting of the minds is further evidenced by additional facts in the record. For example, the fax confirmation sheets, the identified basis for the unilateral contract offers, while stating the maximum price that Grange was supposedly willing to pay also state that "if the cost of the claim is over $1000, please call or email Pricing Approval." R. p. 147, 160; Exhibits D and J. The lack of intent to bind the recipient is also shown by the language "Please contact Safelite...prior to beginning the work for any ... OEM, dealer, net priced, premium, ***other charges*** and any molding parts."(emphasis added). *See, e.g.,* R. p. 147; Stipulated Facts Exhibit D.

Grange's conduct after the work was performed similarly demonstrates that it did not intend to be bound by the amount on the referral sheet because it paid 20/20 amounts different than it offered. *Caulder v. Knox*, 162 S.E.2d 262, 266, 251 S.C. 337, 345 (S.C. 1968) ("The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all witnesses; and subsequent acts are relevant to show whether a contract was intended....A mere declaration of intent will not give rise to a contract." (internal citation omitted)). For example, on the Hampton claim, R. pp. 98-100; Stipulated Facts ¶¶ 49-61, the referral sheet laid out the formula that Grange stated it was willing to pay. R. pp. 99, 147; Stipulated Facts ¶¶50-53, Exhibit D. The pricing formula

equates to an offer to pay $264.69, an offer that 20/20 rejected.[3] After 20/20 performed the replacement and sent Grange an invoice, Grange paid 20/20 $290.53 on this claim. R. p. 99; Stipulated Facts ¶ 57. Had there been a unilateral contract created by 20/20's performance, the amount paid would have been $264.69. That the amount paid was different shows there was no meeting of the minds. The fact that Grange paid more than the alleged contract amount proves that Grange understood the proposed pricing was not accepted by 20/20's performance of the replacement services. In fact, on each claim at issue here Grange paid more to 20/20 than its referral sheet stated it would pay, demonstrating that Grange understood that its proposed pricing was not accepted by 20/20 when it replaced the damaged glass.

There can be little question that if Grange made an offer to its policyholder to resolve the glass claim for $200, the policyholder could reject that offer. Grange could not then bind the policyholder by sending her a fax restating the $200 offer and stating that having the damaged glass replaced constituted acceptance of the settlement offer. Instead, the policyholder would be entitled to the full amount owed under the terms of her insurance policy notwithstanding any effort by Grange to avoid that obligation. Yet, that is precisely what Grange is attempting to do

[3] List price minus 41% ($255.4 – 40% = $150.69); labor $30 + ($30 x 2.3 hours) = $99; adhesive = $15. R. pp. 147, 151. $150.69 + $99 + $15 = $264.69.

here, only directing the offer to 20/20, who stands in the shoes of the policyholder because of the assignment of insurance proceeds.

The requirements for contract formation have been well-established by this Court. The decisions below ignored those requirements in their entirety, thereby putting this case at odds with the established law of this state. As a result the decision of the court of appeals should be reversed.

3. A unilateral contract could not be created because there was no consideration when Grange was doing what it was already obligated to do under the policy, pay for the damage.

The lower courts' decisions ignored a second set of established contract principles recognized by this Court regarding the necessity of consideration in creating contracts. *International Shoe Co. v. Herndon*, 135 S.C. 138, 140, 133 S.E. 202, 203 (S.C. 1926)("It is very true that mutuality of obligation is not an essential element in unilateral contracts....The nonrequirement of mutuality in such contracts, however, does not dispense with the necessity of a valuable consideration."). This Court has been especially clear that performing on a promise that one is obligated to perform is not consideration. *City of Spartanburg v. Spartan Villa*, 273 S.C. 1, 5, 253 S.E.2d 501, 503 (S.C. 1978)("A promise by a party to do that which it has already legally obligated itself to do is not a valid consideration."); *McLeod v. Sandy Island Corp.*, 265 S.C. 1, 11, 216 S.E.2d 746,750 (S.C. 1975)("The authorities are clear that an agreement to do that which

one is already legally bound to do is not sufficient consideration to support a contract."); *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 54, 135 S.E.2d 311, 315 (S.C. 1964)(same).

In the present case, there is no evidence that Grange offered to pay 20/20 any amount beyond what it was obligated to pay under the terms of its insurance policy. To the extent Grange's offers were less than or equal to what was owed under the applicable insurance policies, there was no consideration because Grange was, at best, merely doing what it was otherwise obligated to do, nothing more. The only way Grange could establish proper consideration for its alleged unilateral contracts would be if it offered to pay 20/20 more than the policy required. That, however, necessarily cannot be true given that, in each claim at issue, Grange ultimately paid 20/20 more than what it originally offered.

This principle has been applied in other auto glass claim cases and is not unique to South Carolina. In *Alpine Glass, Inc. v. Illinois Farmers Insurance Co.*, the United States District Court for the District of Minnesota decisively rejected the conclusion identical in every respect to trial court's conclusions here regarding consideration. Transcript of Summary Judgment Hearing, No. 06-CV-1148 (PJS/RLE)(D. Minn. Mar. 30, 2007) *aff'd, Alpine Glass Inc. v. Ill. Farmers Ins. Co.*, 643 F.3d 659, 662 (8th Cir. 2011). Faced with the insurer's argument that faxes sent to independent glass shops constituted binding unilateral contracts with

the glass shops when the shops performed the work, the court denied from the bench the insurer's motion for summary judgment and granted, *sua sponte*, summary judgment for the glass shop.

The court in *Alpine* focused on the lack of consideration to form the agreement, specifically stating: "I don't think that the circumstances here come close to presenting a case of unilateral contracts being formed." *Alpine Glass*, Transcript at 48. Among other problems, the court noted that in these "contracts," the insurer was not agreeing to do anything for the glass replacement company that it was not already obligated to do, therefore the "contracts" suffered from a fatal lack of consideration. "The way I see it, you send these letters off to people saying we will follow the law. Here, you have to charge our prices. In return what we are going to do is what we are already legally required to do. It doesn't sound like much of a deal from Alpine's perspective." *Alpine Glass*, Transcript at 39-40. The conclusion that there was no consideration in *Alpine* is entirely consistent with the law in South Carolina.

In its opinion in *Southern Glass*, the court of appeals incorrectly distinguished *Alpine Glass* contending that the only promise offered in the communication from Safelite was "billing at those rates would result in timely payment." *Southern Glass*, 399 S.C. at 497, 732 S.E.2d at 212. In truth, Safelite

sent essentially the same fax confirmations with the same language on behalf of Farmers that it sent on behalf of Grange here:

> When notified of a claim, Farmers confirmed its price to the glass shop by facsimile before the work started. (A.110-11 at ¶ 15; A.141 at ¶ 17.) ... During the relevant time for this litigation (2003-2006), every Farmers' facsimile to Alpine included a confirmation of price terms and, under the price language, stated: "Performance of services constitutes acceptance of the above price." (A.111 At ¶16; A.141 at ¶16; A.145-48.)

Brief of appellant Illinois Farmers Insurance Company before the United States Court of Appeals for the Eighth Circuit at pp. 14-15, *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, case number 10-1689 (filed May 27, 2010) (available at https://pacer.gov). Contrary to the court of appeals' conclusion, the federal courts in *Alpine Glass* addressed the same unilateral contract claims asserted by Kemper in *Southern Glass* and Grange in the present case. Accordingly, the courts' reasoning should be dispositively persuasive.

Here, Grange provided no consideration for the amount it offered to pay 20/20 because it was already obligated under the insurance policy to pay 20/20 for its services, even assuming that there was a proper offer and that performance of the work constituted acceptance of that offer. Consideration is an essential element of any contract, including unilateral contracts. Accordingly, under the principles established by this Court, if there was no consideration, there was no contract.

International Shoe Co., 135 S.C. at 140. The contrary conclusions by the courts below constitute reversible error

CONCLUSION

Applying South Carolina law to the stipulated facts of this case, no enforceable unilateral contracts were formed. Therefore, 20/20 Auto Glass respectfully requests that the decision of the court of appeals be reversed and that matter remanded to the circuit court.

Respectfully submitted,

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