IN 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 Trustgard Insurance Company, ... Respondents,

v.

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

BRIEF OF RESPONDENTS

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

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

SUMMARY

In *Southern Glass & Plastics Company, Inc. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (Ct. App. 2012), the Court of Appeals joined decisions from North Carolina, Idaho, and Washington, and held 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 in this case are identical to those in *Kemper*, and the courts below correctly applied *Kemper*'s holding here.

Respondents are automobile insurers whose insureds submitted glass repair claims. Each claim followed a similar procedure. During a three-way call with the insured, Appellant 20/20 Auto Glass, and Respondents' third-party administrator, Respondents communicated the price they were willing to pay for repairs. Although Appellant claimed it did not agree to the price, Appellant stated during the phone call, "we guarantee our customer we will not charge them any difference in cost." (R. p. 94, ¶ 26). After the call, but before the work was performed, Respondents sent a referral sheet confirming the amount they were willing to pay and stating that performance of the work constitutes acceptance of the price. Appellant then performed the work.

Under well-established principles of contract law, Grange's offer and communication that performance constitutes acceptance of the price is an offer of a unilateral contract. By performing the work, Appellant accepted the contract. It is undisputed that Grange paid the amount owed under each unilateral contract. Therefore, the lower courts properly held Grange owes Appellant nothing more.

STATEMENT OF THE CASE

This case came before the Honorable Judge R. Scott Sprouse in a bench trial on October 26, 2016. (R. p. 4). The parties submitted a Stipulation of Facts and Exhibits prior to trial. (Id.). On December 6, 2016, after hearing the evidence and considering the arguments of the parties, the Circuit Court entered Findings of Fact, Conclusions of Law, and Final Judgment in Grange's favor. (R. pp. 4-14). The Circuit Court found the parties formed a unilateral contract when Grange made an unambiguous offer to pay for glass repair services, stated that performance would constitute acceptance of the offer, and 20/20 performed the glass repair services. (R. pp. 9-13). In doing so, the Circuit Court relied upon the Court of Appeals' holding in *Kemper* and found the facts indistinguishable from the relevant facts of that case. (R. p. 10).

Appellant filed a Motion to Reconsider on December 16, 2016. (R. p. 80). Grange filed a memorandum opposing the Motion to Reconsider on January 13, 2017. On January 18, 2017, the Circuit Court entered an Order denying Appellant's Motion. (R. pp. 15-16).

On February 10, 2017, Appellant filed a Notice of Appeal. After briefing, the Court of Appeals unanimously affirmed the Circuit Court in a *per curiam* opinion issued on December 31, 2019. Appellant then filed a Petition for Rehearing, which the Court of Appeals unanimously denied on February 10, 2020.

FACTS

A. Grange's reimbursement rates and glass repair providers.

Respondents Grange and Trustgard are insurance companies that are authorized to transact business and write automobile insurance policies in the State of South Carolina. (R. p. 90, ¶ 1). Grange Mutual Casualty and Trustgard Insurance Company are related insurance companies. For ease of reference, both entities will be referred to collectively as "Grange." 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 on 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 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. (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, such prices being effective for work performed on or after April 22, 2011. (R. p. 93, ¶ 19).

Between January 2014 and October 2016, there were eighty-seven (87) glass shops and companies in Grange's South Carolina network that performed glass services for Grange and Grange insureds at the rates and pricing established by Grange. (R. p. 93, ¶ 22). In addition, twenty-eight (28) non-network shops also performed glass 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.

B. Grange's agreement with 20/20.

When a customer approaches 20/20 to perform glass repair services under an insurance policy, a representative of 20/20 connects the customer with the customer's insurance company or the company's representative. In this case, Grange's representative was its third-party administrator, Safelite.[1] (R. p. 94, ¶ 25). The customer, the 20/20 representative, and the Grange representative took part in a three-way call.

During the call, the Grange representative reiterated the amount it was willing to pay for the glass repair services. (R. p. 95, ¶ 28). Then, the 20/20 representative read a scripted response stating they accepted the job but not the price. (R. p. 94, ¶ 26). Nonetheless, the 20/20 representative also guaranteed that the customer – the insured – would not be responsible for any difference in the cost. (R. p. 94, ¶ 26). Grange's representative then informed the insured that he

[1] 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.

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).

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 sent a document to 20/20 containing a dispatch or referral number. 20/20 received the referral sheet before performing the work. (R. p. 99, ¶ 51). The referral sheet reiterated the price or rates that Grange was willing to pay for glass repair services. (R. p. 99, ¶ 52). Importantly, the referral sheet also contained the following statement: "***Performance of services constitutes acceptance of the communicated price and billing instructions***." (R. p. 99, ¶ 53) (emphasis added).

20/20 further admits it understood Grange was not willing to pay any amount greater than the prices/rates the Grange representative stated over the phone, such rates also having been communicated to 20/20 by prior letter and subsequent referral sheet. (R. p. 95, ¶ 31). Moreover, 20/20 never communicated a counterproposal to Grange for the price of the glass repair services. (R. p. 95, ¶ 32). Instead, 20/20 simply proceeded 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).

C. 20/20's subsequent actions.

After performing the work, 20/20 then submitted an invoice to Grange for the glass repair services that exceeded 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 sent payment for an amount less than 20/20's invoice but in the amount Grange previously communicated. (R.

p. 99, ¶ 57). In each instance, 20/20 accepted and deposited the payment. (R. p. 99, ¶ 57). Then, after accepting and depositing the payment, 20/20 sent a "Short Pay Invoice" to Grange. (R. p. 99, ¶ 58).

Months later, 20/20 made 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). As noted above, before the work was performed, 20/20 guaranteed the insured that he or she would not be responsible for any payments for the glass repair services. 20/20 does not ask the insured to sign the Work Order containing the assignment until after that phone call and after the work had been completed. (R. p. 99, ¶ 55; p. 101, ¶ 69; p. 103, ¶ 82; p. 105, ¶ 101). The assignment states 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).

D. The Grange insurance policy.

The policy terms in this case are the same for each insured. 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).

[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 attempts to evoke the policy's appraisal provision to address its manufactured dispute over repair costs. That provision 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) (emphasis added). None of the claims in this case involves a dispute over the actual cash value of the insured vehicle.

STANDARD OF REVIEW

"In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings." *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct. App. 2003) (citation omitted). However, if the "appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *Id.* (citation omitted). The Circuit Court evaluated numerous exhibits submitted by the parties. Therefore, the Circuit Court's factual findings are subject to the strict "any evidence" standard, while its conclusions of law are reviewed de novo.

ARGUMENT

Applying *Kemper* – a case with identical relevant facts – the courts below properly held that 20/20 entered into a unilateral contract with Grange. The formation of a unilateral contract requires three elements – a specific offer, communication of the offer, and performance by the

offeree – each of which were met in this case. With respect to the first two elements, the Circuit Court found as a factual matter that 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." Despite its arguments on appeal, 20/20 stipulated that the offers were unambiguous and that it understood the offers. (R. p. 95, ¶¶ 28 & 30-31; p. 42:16-43:19). After reviewing the evidence, the Circuit Court factually found the offers were unambiguous. (R. p. 8, ¶¶ 12-15). With respect to the third element, after Appellant received the unambiguous offers and without any further communications between 20/20 and Grange, 20/20 performed the glass repair services. Therefore, 20/20 entered into binding unilateral contracts 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 its obligations under the unilateral contracts with 20/20 and under the insurance policy.

The courts below properly applied the Court of Appeals' prior holding in *Kemper*. The decision in *Kemper* followed holdings from multiple other jurisdictions that found unilateral contracts under similar circumstances. In *Kemper*, the Court of Appeals fully analyzed the unilateral contract case cited by Appellant and correctly found it distinguishable. Because the Circuit Court made factual findings establishing each element of a unilateral contract, the decision should be affirmed.

Rather than addressing *Kemper*, Appellant makes "red herring" arguments concerning lack of consideration, the glass claims handling statute, and the *Narruhn* decision – each of which are without merit. The unilateral contract was supported by adequate consideration, specifically a promise to pay money. The glass claims handling statute codified and approved the transaction at issue here and in *Kemper*. Additionally, the *Narruhn* decision – addressing standing for Rule 60(b)

motions – is inapplicable to this unilateral contract case. Therefore, the Circuit Court's decision should be affirmed, and Appellant's requested relief should be denied.

I. Under well-established principles of contract law and as the Court of Appeals held in *Kemper*, 20/20's performance of work after receiving a clear offer from Grange formed a unilateral contract between Grange and 20/20.

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

A. On facts that are materially identical to those in this case, the Court of Appeals 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 (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). The offeree accepts the offer "by performing the act on which the promise was impliedly or expressly based." *Small v. Springs Indus., Inc.*, 292 S.C. 481, 484, 357 S.E.2d 452, 454 (1987); *Saunder*, 354 S.C. at 405, 581 S.E.2d at 165-66 ("A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance." (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. Likewise, the painter cannot paint the home and then demand that the homeowner pay 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 by the offeree. *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.

Looking at each element of a unilateral contract, the first and second elements are satisfied here by Grange's communication of a clear offer to 20/20. Grange communicated its fair and reasonable price in three ways: (1) via fax to all of its network and non-network glass repair shops; (2) during the three-way call with 20/20 and its insured; and (3) via the referral sheet. Grange then paid that amount once it was billed. Acceptance took place when 20/20 performed the work. Thus, a unilateral contract exists between Grange and 20/20.

i. Grange satisfied the first two elements of a unilateral contract – specific offer and communication of offer – when it made a clear offer to 20/20 and stated that performance constituted acceptance.

In *Kemper*, the Court of Appeals affirmed summary judgment in favor of an insurer on nearly identical facts. The insurer in *Kemper* – like Grange here – notified glass repair shops of its fair and reasonable rates for glass repair claims. 399 S.C. at 487, 732 S.E.2d at 207. After an insured's vehicle suffered a glass breakage, the insured approached the glass repair company. *Id.* The insurer's third-party administrator, the glass repair shop, and the insured then participated in a three-way call. *Id.* During the call, the third-party administrator communicated the amount the

insurer was willing to pay. *Id.* Then, after the call, the insurer sent a referral sheet that reiterated the offered price. *Id.* The referral sheet stated: "Performance of services constitutes acceptance of the communicated price and billing instructions." *Id.* at 488, 732 S.E.2d at 207. After the glass repair shop performed the work, it tried to bill the insurer for more than the agreed price. *Id.*

Under these identical facts, the Court of Appeals in *Kemper* affirmed summary judgment for the insurer, finding a clear offer from the insurer to enter into a unilateral contract. By performing the work, the glass repair shop accepted the offer, thus forming the contract. *Id.* The Court of Appeals held it was the shop's performance of the work after receiving the written referral sheet that created the unilateral contract, not the words spoken during the call.[3] *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 insureds, not by Southern Glass's verbal response.") (emphasis in original). Therefore, the holding in *Kemper* squarely applies to this case.

Moreover, the Court of Appeals in *Kemper* did not reach its decision in a vacuum. Instead, it looked to other jurisdictions, including North Carolina. In *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, the North Carolina Court of Appeals granted summary judgment in favor of a group of insurers on similar facts. Notably, the North Carolina Court of Appeals highlighted the many ways the insurers communicated the amount they were willing to pay for the repair services prior to 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

[3] Like 20/20 here, the glass repair shop in *Kemper* stated that it informed Safelite "on more than one occasion" that it did not accept the insurer's prices. *Id.* at 488, 732 S.E.2d at 208. However, the insurer submitted a transcript of one of the phone calls indicating that glass repair shop failed to object to the price during one of the calls. *Id.* The Court of Appeals found this evidence immaterial because the glass repair shop's actions created the contract, not its words.

> 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) via its April 15, 2011 letter to glass repair shops, which 20/20 received; (2) via telephone during the three-way call with the Grange insured, 20/20 and the Grange representative; (3) via confirmation letter or fax of the referral sheet after claims were made but before the work was performed; and (4) via eventual payment of 20/20 invoices at the Grange rate. (R. pp. 10-11, ¶ 7).[4]

As in *Kemper* and *CIM Ins. Corp.*, 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. (R. pp. 8, ¶ 14). Although 20/20 now claims the offers were ambiguous, the Circuit Court found 20/20 understood Grange's pricing structure and did not find the pricing or rates to be vague or ambiguous. (R. p. 8, ¶ 14) ("20/20 Auto Glass did not find the pricing and rates communicated by

[4] 20/20 makes much of the fact that it objected to the price. However, "[i]t 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 before a contract is formed." *CIM Ins. Corp.*, 190 N.C. App. At 812, 660 S.E.2d at 910; *see also Dargan v. Page*, 222 S.C. 520, 533, 73 S.E.2d 705, 711 (1952) (stating that a contract which is "unilateral in character" gives the offeree "a right and privilege which only by strict compliance with the terms" can be transformed into a binding contract). As discussed below, if 20/20 disagreed with the price, it could: (1) refuse to perform the work; (2) accept the insurance payment and collect the difference from the insured; or (3) contract directly with the customer for payment for the work. Rather than doing any of the foregoing, 20/20 accepted Grange's unilateral offer by performing the repairs, knowing that Grange would not pay more than the price it clearly specified.

the claims representative or contained in the referral sheets to be ambiguous, but understood it to mean that Grange did not agree to pay any amount greater than the stated pricing or rates."). That finding is based on 20/20's own admissions that: (1) "The pricing that the insurance company is willing to pay is always communicated during the phone call;"[5] (2) the claims representative tells 20/20 "the insurance company only agrees to pay a specific rate for the job;"[6] (3) "20/20 Auto Glass does not believe the claims representative's response is vague or ambiguous;"[7] and (4) the rate is always stated – either by specific price or by formula – in the referral sheet.[8] Based on these facts and the other evidence in the record, the Circuit Court found:

> [T]he undisputed facts establish that the unilateral contracts contained clear offers and were supported by adequate consideration. Although 20/20 Auto Glass may not like the pricing terms of the unilateral contract offer that was made by Grange, it is undisputed that they understood what those pricing terms were before they performed the job.

(R. p. 13, ¶ 13). Thus, the Circuit Court reviewed the evidence and found that Grange made a specific offer and communicated that offer to 20/20, satisfying the first two elements of a unilateral contract.

ii. By performing the work after receiving a clear offer, 20/20 accepted Grange's offer and formed a binding unilateral contract.

When 20/20 performed the glass repair services, it satisfied the third "performance" requirement for a unilateral contract. 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

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[5] (R. p. 95, ¶ 28).

[6] (R. p. 95, ¶ 30).

[7] (R. p. 95, ¶ 31).

[8] *See e.g.*, (R. p. 99, ¶ 52, p. 160).

Grange's representative.[9] In *Kemper*, the Court of Appeals held that the glass repair shop's performance of the repairs constituted acceptance of the offer. *Id.* at 497, 732 S.E.2d at 212 ("By proceeding with the work after receiving notice of the prices via phone conversation and fax, Southern Glass accepted the prices."). 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.

In the world of unilateral contracts, actions speak louder than words. Although 20/20 claims it objected to Grange's quoted price, it chose to do the work. As the Court of Appeals recognized in *Kemper*, it is not the words spoken by the offeree, but the performance of the work that forms the binding contract. *Kemper*, 399 S.C. at 498, 732 S.E.2d at 213. Like the glass repair shop in *Kemper*, the repair shop in *CIM Ins. Corp.* also objected to the pricing. 190 N.C. App. at 812, 660 S.E.2d at 910. Nonetheless, the Court of Appeals held the glass repair shop's performance of the work constituted acceptance of the offer. *Id.*

The Washington Court of Appeals also found a unilateral contract is formed when a glass repair company performs repair services after receiving an offer from the insurance company:

> Cascade accepted Progressive's offer by performing glass repair work for Progressive's insureds. A unilateral contract exists when one party offers to do a certain thing in exchange for the other party's performance, and performance by the other party constitutes acceptance. Cascade created binding unilateral contracts each time

[9] 20/20 argues that it did not accept via performance because it did not follow Grange's billing instructions. However, the referral sheets state "Performance of services constitutes acceptance of the communicated price and billing instructions." (R. p. 168) (emphasis added). Thus, it was 20/20's performance of the glass repair services that constituted acceptance. Once the work was performed, the unilateral contract was formed, and 20/20's failure to comply with the billing instructions did not vitiate the contracts.

> it repaired or replaced auto glass for Progressive's insureds after receiving Progressive's new offer. Progressive owes the amounts it promised to pay in the [offer] letters; Cascade is entitled to no more than those amounts.

Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co., 145 P.3d 1253, 1257-58 (Wash. Ct. App. 2006) (internal citation omitted).

The facts of this case are identical to those in *Kemper*, and the facts creating a unilateral contract conform to the above cases from North Carolina and Washington. 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 courts below properly relied upon *Kemper* and found Grange's payment of the offered price after 20/20 performed the work satisfied Grange's contractual obligations.

B. The Court of Appeals in *Kemper* fully analyzed the case cited by Appellant and correctly found it distinguishable.

The *Kemper* decision is directly on point, yet Appellant spends minimal time addressing the *Kemper* decision in its opening Brief. In fact, Appellant only cites to *Kemper* three times in its entire 18-page argument section. In addition to being directly applicable on its facts and law, the Court of Appeals in *Kemper* reviewed and rejected the cases cited by Appellant in its Brief.

Specifically, Appellant relies heavily on the Eighth Circuit's reasoning in *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, 643 F.3d 659 (8th Cir. 2011) (applying Minnesota law). This case is distinguishable for several reasons: (1) its holding does not evaluate any referral sheet as an offer; (2) its holding applies bilateral contract concepts in the context of a unilateral contract; and (3) its holding relies on dissimilar Minnesota statutory law.

The Circuit Court below found the referral sheet – which specified performance constituted acceptance – was an offer of a unilateral contract. The decision in *Alpine Glass* never discusses

any 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 faxes" and never references or even acknowledges any referral sheet. *Id.* at 666-67 ("Even if the blast faxes constituted offers . . .."). Thus, the Eighth Circuit evaluated the general fax sent to all glass repair shops that stated the rates the insurer intended to pay for work on a general basis. In contrast, the referral sheets in this case were faxed offers for each specific job, referencing the job and the price for that specific work. 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, there is no indication whatsoever that the Eighth Circuit ever considered or was aware of that fact. Nothing in the Eighth Circuit's written opinion discusses this 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. (R. p. 99, ¶ 53; 101, ¶ 67; p. 102, ¶ 78; p. 105, ¶ 101). This distinction is particularly important because the Eighth Circuit found acceptance required performance of the work and conformity to the insurer's billing instructions. Here, the referral sheets from Grange state: "Performance of services constitutes acceptance of the communicated price and billing instructions." (R. p. 147). Thus, it was 20/20's performance of the work that constituted acceptance of Grange's offer, not 20/20's billing practices.

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)). With due respect 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. *See Fleming v. Borden, Inc.*, 316 S.C. 452, 461, 450 S.E.2d 589, 595 (1994) (recognizing criticism for "applying bilateral contract concepts to a unilateral contract" and refusing to apply such concepts to a unilateral contract).[10]

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. *See Small*, 292 S.C. at 484, 357 S.E.2d at 454. If performance is completed, but non-conforming, the

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[10] Appellant's Brief also repeatedly argues that a unilateral contract could not be created because there was no "meeting of the minds." (Appellant's Br. pp. 14-21). This Court has previously rejected the argument that a "meeting of the minds" is necessary for the formation of a unilateral contract, stating that such argument might be valid "if it were applied to a bilateral contract" but not when applied to a unilateral contract. *Small*, 292 S.C. at 484, 357 S.E.2d at 454. All that is required for acceptance of a unilateral contract is "performing the act on which the promise was impliedly or expressly based." *Id.*

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.").

Lastly, "[i]n Minnesota, the auto glass industry is highly regulated, and the parties' conduct is better explained by Minnesota's auto-insurance statutory scheme than by any purported unilateral contracts." *Alpine Glass*, 643 F.3d at 667 (internal quotations). The then-applicable statute in Minnesota required the insurer to pay the vendor "a competitive price that is fair and reasonable within the local industry at large." *Id.* (citing Minn. Stat. § 72A.21 sub. 6(14)-(16). Thus, the statute sets the insurer's obligation at the prevailing market price.

In stark contrast, South Carolina's statute (discussed further below) allows the insurer to determine a fair and reasonable rate of reimbursement. S.C. Code § 38-57-75(E)(1) (stating the insurer must determine if the provider will perform the repair "at the insurer's fair and reasonable rate of reimbursement" and, if not, inform the insured that he or she "will be responsible for additional costs."). Thus, South Carolina's General Assembly chose to allow the insurer to set a fair and reasonable rate. *See Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 539, 753 S.E.2d 437, 439 (Ct. App. 2013) ("[S]tatutes relating to an insurance contract are generally

part of the contract as a matter of law."). Here, Grange's rates were accepted by 115 glass repair shops in South Carolina.[11]

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 errant bilateral contract reasoning in *Alpine Glass* – 20/20 accepted the unilateral offer by performing the work. Therefore, its decision after the contract was formed to submit an invoice for more than the contractual price cannot be construed as a counteroffer.

II. In an effort to avoid being bound by the unilateral contract, Appellant makes several "red herring" arguments, each of which is without merit.

Appellant's three main arguments concern: (1) lack of consideration; (2) the glass claims handling statute; and (3) the *Narruhn* decision. All these arguments lack merit. Appellant argues that the unilateral contract lacked consideration because of the pre-existing duty rule. The pre-existing duty rule applies to subsequent contracts between the same contracting parties. It does not apply to separate contracts with third parties, like the unilateral contract between Grange and 20/20. The contract between Grange and 20/20 was supported by the most classic form of consideration – money.

With respect to the glass claims handling statute, rather than precluding this type of unilateral contract, the statute codified the transactions that took place in *Kemper* and here. The

[11] The regulation of the insurer's practices is subject to the South Carolina Unfair Claim Practices Act. S.C. Code § 38-57-75(L). As this Court has held, the Claims Practices Act does not create a private cause of action. *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 137, 526 S.E.2d 218, 221 (2000) (finding the remedy for claims practices complaints is to bring an administrative action before the Chief Insurance Commissioner).

statute specifically allows the insurer to inform the insured that the insured will be responsible for the difference between the fair and reasonable rate the insurer is willing to pay and the rate charged by the glass repair company. The fact that 20/20 chose not to recover this price difference from the insured in no way grants it the right to recover additional amounts from Grange.

Appellant also claims this Court's decision in *Narruhn* prevents the formation of a unilateral contract between Grange and 20/20. In *Narruhn*, the Court held that an insurer lacked standing to bring a Rule 60(b) motion. Despite the holding of the case having nothing to do with unilateral contracts or post-loss assignments, Appellant claims that the case changed the "legal landscape" in South Carolina with respect to post-loss assignments. This Court did not purport to change the law in the dicta in *Narruhn*. Moreover, the courts below did not rely on the assignment. Therefore, *Narruhn* is inapplicable, and Appellant is bound by the unilateral contract it entered into with Grange.

A. 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.

To avoid the plain holding in *Kemper* that a glass repair shop's performance constitutes acceptance of the insurer's unilateral offer, 20/20 argues that Grange's offer lacked consideration. 20/20 claims that, because Grange was already contractually obligated to its insured to pay for repairs to the windshield, its offer to pay 20/20 does not constitute consideration.

The consideration paid here by Grange is the most classic form of consideration: money. *See Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998) ("Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other"). The pre-existing duty rule does not apply to separate contracts with third parties like 20/20. Through the unilateral contract, 20/20 gained a duty owed

directly to it that did not exist prior to the formation of that contract – i.e., Grange's duty to pay money to 20/20. Moreover, as additional consideration for the unilateral contract with 20/20, Grange gave up its contractual right to choose to pay its insureds directly instead.

i. The pre-existing duty rule does not apply to a separate contract with a third party, like the unilateral contract between Grange and 20/20.

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 in exchange for the repairs was not consideration. Prior to entering into the unilateral contract with 20/20, Grange did not have any obligation to pay money to 20/20. As the Arizona Court of Appeals stated, "the trend of the law is to hold that the performance of a preexisting contractual duty is consideration provided the duty is not owed to the promisor." *USLife Title Co. of Arizona v. Gutkin*, 732 P.2d 579, 586 (Ariz. Ct. App. 1986) (citing *Restatement (Second) of Contracts* § 73, comment (d) (1979)).[12] This rule focuses not on whether the party at issue is under a duty but whether the

[12] *See, e.g., Morrison Flying Serv. v. Deming Nat'l Bank*, 404 F.2d 856, 860-61 (10th Cir. 1968) (holding that there was consideration in an agreement between a subcontractor and a financing bank to provide and to pay for supplies, respectively, despite prior agreements between both parties and the main contractor to do the same); *Scherer v. Laborers' Int'l Union*, 746 F. Supp. 73, 83 (N.D. Fla. 1988) (holding that a promise by an employee of one union to another union of her cooperation constituted consideration even if she was already obligated to cooperate because "[t]he performance of a pre-existing duty may be consideration if the duty is not owed to the promisor"); *Briskin v. Packard Motor Car Co. of N.Y.*, 169 N.E. 148, 149-50 (Mass. 1929) ("The promise of the plaintiff to perform his contractual duty to pay his note to the holder of the note and otherwise to perform the obligation imposed on him by the conditional contract was a sufficient consideration for the promise of the defendant, if the defendant thereby received any legal benefit."); *Patterson v. Katt*, 791 S.W.2d 466, 469-70 (Mo. Ct. App. 1990) (holding that the plaintiff's promise to the defendant individually was consideration, even though the plaintiff had already contracted for the same performance with the defendant's corporation); *Joseph Lande & Son, Inc. v. Wellsco Realty, Inc.*, 34 A.2d 418, 423 (N.J. 1943) (accepting a promise by a subcontractor to a property owner to complete work in accordance with a contract with the general contractor); *Perry M. Alexander Constr. Co. v. Burbank*, 350 S.E.2d 877, 880 (N.C. Ct. App. 1986) ("[W]e hold that plaintiff's promise to perform the demolition suffices as consideration for Burbank's promise to pay even though the promise to perform the demolition was also the consideration in the contract between plaintiff and Sure-Fire."); *Chvatal v. U.S. Nat'l Bank of Or.*, 589 P.2d 726, 728 (Or. 1979) ("[E]ven

party is under a duty *to the other party*. As the North Carolina Court of Appeals explained, "the same factors [of the preexisting duty rule] do not come into play where a third person is involved." *Burton v. Kenyon*, 264 S.E.2d 808, 809 (N.C. Ct. App. 1980). Here, that third person/third party is 20/20. Prior to the formation of the unilateral contract, Grange was under no duty to 20/20.

Although the third party receives in exchange a promise to do something already owed to someone else, it gets the exact consideration bargained for – a promise to which the third party previously had no right and one that the third party would not otherwise have received. This is a benefit to which the third party previously had no entitlement. The third party receives the valuable status of being the obligee of the duty in question. Thus, the subsequent promise to the third party constitutes consideration because the third party acquires a duty owed directly to it.

The cases Appellant cites in support of its argument are entirely distinguishable because they do not involve a separate contract with a third party. Two of the cases dealt with situations where one party to a contract attempted to change the pre-existing contract's terms. *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).[13] Importantly, both of those cases only involved the same

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if we were to accept defendant's assumption that plaintiff's statement to his supervisor obligated him toward the Abel company, this alone does not prevent his subsequent performance of his work from being consideration for the promise of a third party, which had an independent interest in his performance of that work, to see that the compensation earlier promised by his financially incapacitated employer would in fact be paid."); *Enco, Inc. v. F.C. Russell Co.*, 311 P.2d 737, 744 (Or. 1957) (holding that a promise by a window producer to the manufacturer of wood surrounds that the producer would ship windows according to a schedule was valid consideration, even though the producer had already contracted with the consumer to ship the windows according to that same schedule).

[13] 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.

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. The pre-existing duty rule set forth in those cases does not apply in this situation where there is the creation of a separate contract with a new third party.

ii. There was sufficient consideration to support the unilateral contract between Grange and 20/20.

Here, Grange had no contractual obligation to repair the glass damage, nor did it have any existing contract with 20/20. At its option, Grange could choose to pay to repair the vehicle or to make payment directly to its insured. (R. p. 133, Payment of Loss) ("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.[14] Grange chose the latter option. In each instance, Grange satisfied the insurance obligation by entering into a separate unilateral contract with 20/20 to perform the repairs. The offers by Grange to pay 20/20 to perform the repairs – as opposed to paying the insureds directly, which was Grange's right – constituted separate consideration for each of the five separate transactions. Upon the creation of the unilateral contract, 20/20 gained a duty owed directly to it and Grange gave up its right to choose to pay its insured directly.

Both Grange's contract with its insured and Grange's contract with 20/20 are enforceable by the parties to the contracts. If 20/20 failed to satisfactorily perform the glass repairs, Grange's insured could pursue Grange for failing to satisfy its obligations under the policy because Grange neither paid its insured directly nor paid to have the repairs properly performed. In turn, Grange could sue 20/20 for failing to perform the repairs that were promised. Both contracts are enforceable.

The situation at issue here is actually very common. For example, the Court of Appeals of Louisiana in *Abney v. Allstate Insurance Company*, 442 So.2d 590 (La. 1983), found a contractor hired by the insurance company to repair damaged property entered a contractual relationship with the insurer, not the insured. However, the insured was an intended third-party beneficiary. Therefore, the insured could sue both the insurer for failure to have the repairs properly performed and the contractor for breaching its contract with the insurer to perform the repairs. *Id.* at 591.

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[14] As the Supreme Court of Rhode Island held interpreting a similar payment of loss provision: "The policy language is clear that it is the insurer, not the insured, who has the right to elect one of these options." *Pawtucket Mut. Ins. Co. v. Gay*, 786 A.2d 383, 386 (R.I. 2001); *see also Hamby v. State Farm Mut. Auto. Ins. Co.*, 137 S.W.3d 834, 837 (Tex. Ct. App. 2004).

In the construction industry, contracts between general contractors and property owners routinely include a clause requiring the general contractor to pay its subcontractors. The general contractor then enters into separate contracts with each subcontractor. It would be a spurious argument to claim the sub-contracts are void for lack of consideration merely because the general contractor has already contractually agreed with the owner that it will pay the subcontractors. When the contractor pays the subcontractor, it satisfies its contractual obligations under both the contract with the owner and the contract with the subcontractor.

Like the insurer in *Abney* and like the general contractors in the example above, Grange entered into a contract with 20/20 to perform glass repair services. When 20/20 performed those repairs and Grange paid the contractual amount, it simultaneously satisfied its contractual obligations to the insured under the insurance contract and to 20/20 under the unilateral contract.

In sum, the pre-existing duty rule does not apply when there is a separate contract with a third-party, like the unilateral contract between Grange and 20/20. Grange entered into a unilateral contract with 20/20 when 20/20 performed the work. Grange's promise to pay 20/20 – and giving up of its right to choose to pay its insureds instead – constituted consideration.

B. After *Kemper*, the General Assembly codified the transaction that took place in *Kemper* and in this case by enacting South Carolina Code § 38-57-75.

20/20 is correct in one regard: South Carolina statutory law changed after the Court of Appeals' decision in *Kemper*. After the decision in *Kemper*, the General Assembly enacted South Carolina Code § 38-57-75 effective 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 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 approved by statute. "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 the statutory requirements by informing the insureds that they may be responsible for the additional cost ***even though*** 20/20 had already guaranteed during each telephone call that the insureds 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. (R. p. 7, 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.

The only change that has taken place in South Carolina law since the Court of Appeals' 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 the Court of Appeals' opinion in *Kemper*.

Appellant creates a straw man by misstating Grange's position. Appellant phrases Grange's position as: "if 20/20 does not agree with [Grange's] pricing, 20/20's only option is to refuse to do the work." (Pet. Br. p. 9). That is not Grange's position. The Supreme Court of Idaho listed the glass repair shop's options:

> 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 for the work, leaving the customer to seek reimbursement from Farm Bureau.

Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co., 141 Idaho 660, 664, 115 P.3d 751, 755 (2005). The Court of Appeals in *Kemper* adopted the reasoning of the Idaho Supreme Court. *See Kemper*, 399 S.C. at 493-94 & 497, 732 S.E.2d at 210 & 212.

Like the glass repair shops in *Kemper* and *Idaho Farm Bureau Ins. Co.*, 20/20 had options here. Yes, it could have refused to do the work. It did not. 20/20 also could have chosen to tell the insured 20/20 was going to charge more than Grange was willing to pay and that the insured would be responsible for the difference. In fact, this right is expressly authorized by South Carolina Code § 38-57-75(E)(1) ("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."). But, 20/20 did not choose this option. Likewise, 20/20 could have chosen to charge the insured and left it to the insured to seek recovery under the policy. However, 20/20 did not choose any of those options. Instead, 20/20 guaranteed to the insured that 20/20 would "not charge them any difference in cost." (R. p. 94, ¶ 26). This promise induced the insureds to select 20/20 to perform the repairs. Like the glass repair

shops in *Idaho Farm Bureau Ins. Co.* and in *Kemper*, 20/20 chose to accept the job. By doing so, it accepted the unilateral contract.

Likewise, Grange did not require the insured to have repairs done at 20/20. The insured was free to have repairs performed wherever he or she chose. As written in the statute, Grange was only required to pay its fair and reasonable rate, and the insured would be responsible if it chose a repair shop that charged more than that amount – again, an amount that 115 glass repair shops in South Carolina accepted.[15]

Had 20/20 intended to charge more than Grange was willing to pay, then it is unclear whether any of the insureds would have actually chosen to have the work performed by 20/20. However, that doubt merely confirms that the insured had the freedom to choose a shop. A rational insured faced with the decision of having routine glass repair work done by 20/20 or by one of 115 other glass repair shops in South Carolina would pick the shop that will perform the work at the insurer's fair and reasonable rate. Had 20/20 really intended to charge the insured any more than that amount, the insureds would likely have gone somewhere else with their business. The statute

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[15] 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.

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 above what Grange offered to pay. 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.

balances the insurer's right to set fair and reasonable rates with the insured's right to choose where to have the work performed. Appellant's methods are an attempt to usurp the insurer's statutory right and exploit the insured's statutory right for its own benefit.

As the Circuit Court found, the transaction here complied with all of the requirements of § 38-57-75. The statute codified the very transactions that took place in *Kemper* and here.

C. This Court's decision in *Narruhn v. Alea London Ltd.* has no application to this case.

In an apparent effort to avoid the clear precedent in *Kemper*, Appellant argues that South Carolina law has changed as a result of this Court's decision in *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013). Appellant previously argued to the Court of Appeals that *Narruhn* "reaffirmed" South Carolina law. (Appellant's Ct. App. Br. p. 13). Either way, the holding in *Narruhn* has no application here for three reasons: (1) the lower courts' holdings were based on the unilateral contract entered into between Grange and 20/20, not any application of 20/20's purported assignment; (2) the glass repair shop in *Kemper* had an assignment; and (3) as the purported assignee, 20/20 stands in the shoes of the insureds who were never contractually obligated to pay anything more than the amount Grange offered to pay.

i. The assignment issue is a red herring because the lower courts relied on the unilateral contract between Grange and 20/20.

The Circuit Court and Court of Appeals here did not rely on the assignment in reaching their decisions. 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 the unilateral contract when it paid 20/20.

20/20 incorrectly argues that Grange was required to pay money to its insured for repairs to the vehicle as soon as a loss occurred, and that this right was immediately assignable upon a loss. As noted above, that is not what the insurance contract says. Under the "Payment of Loss" provision, Grange reserves the exclusive right to either pay or, "at our option," to repair or replace the damaged property instead of paying the insured directly. (R. p. 133). Thus, under the contract, Grange – not the insured – had the right to choose whether to pay the insured in money or to pay to have the glass repaired.

Grange chose the latter option here. Grange contracted with 20/20 to repair the glass instead of paying money directly to its insured for the amount of the loss. Thus, Grange exercised its contractual right to have the glass repaired. Therefore, the assignment is not relevant.

ii. The glass repair shop in *Kemper* had an assignment, and there has been no change in the law regarding assignments since the *Kemper* decision.

This Court's decision in *Narruhn* addressed an insurer's standing to bring a Rule 60(b) motion challenging an assignment. The Court held the insurer lacked standing and refused to address the propriety of the assignment. *Narruhn*, 404 S.C. at 345, 745 S.E.2d at 94. Even with respect to the *dicta* in *Narruhn*, it involved a post-judgment assignment of an insured's breach of contract claim for failure to defend and indemnify under a liability policy. None of those issues is present in this case. The glass breakage claims here 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, this Court in *Narruhn* 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.

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.

iii. As a purported assignee, 20/20 stands in the shoes of the insureds – the same insureds 20/20 guaranteed would not be required to pay for the glass repairs.

Appellant contends it is entitled to collect whatever amount it chooses to place on an invoice created after the work is performed even though no one ever agreed to pay that amount for 20/20's work. To reach that conclusion, 20/20 relies on a purported assignment. However, the stipulated facts confirm: (1) 20/20 told each customer before the customer agreed to have 20/20 perform the work, that it "guarantee[d] [the] customer we will not charge them for any difference in cost" above what Grange was willing to pay; (2) 20/20 never gave a counter-proposal for the job price; and (3) the customers did not sign the Work Order with the purported assignment until

after the work was completed.[16] In fact, the Work Orders did not even state the price 20/20 intended to try to charge Grange. (R. p. 149 & 162).

Thus, at the time the insured signed the purported assignment, the insured owed 20/20 nothing. As an inducement to have the insured assign the job to 20/20, it promised the insured he or she would not owe anything. Basic rules of contract and promissory estoppel would prevent 20/20 from seeking more from the insured than the amount Grange had already communicated it was willing to pay. *See North American Rescue Products v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) (identifying elements of promissory estoppel).

As this Court reiterated in *Narruhn*, an "[i]nsurer still retains all of its defenses and rights under the insurance contract" after an assignment. 404 S.C. at 343, 745 S.E.2d at 93. "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." *Id.* at 343-44, 745 S.E.2d at 94 (quoting *Chet Adams Co. v. James F. Pedersen Co.*, 308 S.C. 410, 413, 418 S.E.2d 337, 338 (Ct. App. 1992)). This Court has long recognized that an "assignee . . . ordinarily, however, acquires no greater right than was possessed by his assignor, but simply stands in the shoes of the latter." *Patten v. Mutual Ben. Life Ins. Co.*, 192 S.C. 189, 6 S.E.2d 26, 30 (1939) (citation omitted).

Because 20/20 promises its customers they would not be charged any amounts above what the insurance company offered to pay for the loss, the assignment from the insureds is, by definition, an assignment for the amount Grange offered during the telephone call. This fact is made even more evident by the fact that 20/20 did not communicate any alternative price before performing the work.

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[16] (R. pp. 95-96, ¶¶ 26, 32, 36).

Only after receiving the guarantee did the insured agree to allow 20/20 to do the work. (R. p. 94, ¶ 26; p. 95 ¶¶ 29-30; p. 96, ¶ 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 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) ("[G]enerally 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.

This Court's holding in *Narruhn* is not applicable to this case. Grange entered into a unilateral contract when it offered to pay a specific amount for the work, communicated the offer to 20/20, and 20/20 chose to perform the work. Thus, the assignment is irrelevant. Even if the Court considers the assignment, 20/20's pre-work guarantee to the insureds precludes 20/20 from claiming the assignment entitles 20/20 to charge more than the amount offered by Grange. Because the insureds were never responsible for any amount above what Grange offered, the assignments cannot place 20/20 in a better position than the insureds. Therefore, when Grange paid at least the amount stated in its offers, it satisfied its contractual obligations to 20/20.

CONCLUSION

The Circuit Court and Court of Appeals 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. 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 the glass repairs. Therefore, the Circuit Court properly entered judgment in favor of Grange, and the Court of Appeals properly affirmed. Respondents respectfully request that this Court also affirm.

Respectfully submitted,

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February 8, 2021

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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 Trustgard Insurance Company,.....Respondents,

v.

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

CERTIFICATE OF COMPLIANCE

I, Wesley B. Sawyer, attorney for Respondents, certify that the Brief of Respondents complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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