THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2015-001456

South Carolina Electric & Gas Co., ...Respondent,

v.

Anson Construction Co., ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 12, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err by making a factual determination as to the documents forming a contract based on its own theory of the case where substantial questions of fact exist regarding the intentions of the parties?

2. Did the Court of Appeals err in upholding the Lower Court's determination that three separate documents, only one of which was executed by any party, make up an enforceable contract?

STATEMENT OF THE CASE

At issue in this litigation is whether Petitioner, Anson Construction Company ("Anson"), a local Charleston contractor, will be required to pay more than a half-million dollars to Respondent, South Carolina Electric Gas Co. ("SCE&G"), based on an indemnity provision that SCE&G sought to add into a contract after it had already accepted Anson's Quotation.

The underlying contract negotiations began with Respondent SCE&G's desire to relocate transformers from the Dock Street Theater in Charleston to an underground vault in Church Street. R.p. 305, line 12-p. 306, line 14. After talking with City officials about the project, SCE&G's senior engineer in Charleston, Claude Newton, working with SCE&G's staff in Columbia, designed the project. R.p. 357, lines 7-24; p. 365, line 16-p. 366, line 11; R.p. 304, lines 13-23, p. 307, lines 1-17. SCE&G determined the specifications and location of the vault to be used to house its transformer. R.p. 379, line 4-p. 380, line 11. The location it selected was under a sidewalk in front of the French Huguenot Protestant Church.

After designing the project and obtaining permits from the City to do the work, SCE&G contacted Anson and requested a proposal. R.p. 310, line 2-p. 311, line 22; R.p. 404, line 9-p. 405, line 16. SCE&G and Anson representatives met at the proposed site in early December 2007, at which time the details were provided to Anson. R.p. 412, line 24-p. 414, line 15. Anson subsequently provided SCE&G a proposal that included all of the material terms of the contract. In early January 2008, when SCE&G was ready to begin the construction, Anson informed the utility that it would not begin work until it had a signed contract. R.p. 483, line 24-p. 484, line 1. On Friday, January 4, 2008, SCE&G, in the person of Jesse Thigpen, accepted the Anson Quotation by signing the document and delivering a signed copy to Clay "Whit" Stutsman, Anson's project manager. R.p. 313, line 9-p. 314, line 5; R.p. 708.

By signing the Anson Quotation, SCE&G accepted its terms without modification. R.p. 405, lines 5-10. Thigpen, on behalf of SCE&G, testified that he signed the quotation "so that Anson could go to work." R.p. 313, lines 21-25, p. 340, line 3-p. 342, line 15. Anson considered its approved, unmodified quotation as the "contract document" and started work on January 7, 2008. R.p. 475, lines 11-23, p. 481, line 23-p. 482, line 19.

Also on January 4, 2008, SCE&G emailed a Purchase Order and General Terms and Conditions to Anson. However, when Mr. Thigpen met Clay Stutsman on site to mark out the location of the vault, the only documents he had – and gave to Clay – were the signed Anson Quotation and permits from the City of Charleston. R.p. 339, line 19-p. 340, line 20. Mr. Thigpen, the SCE&G representative, did not have a copy of the SCE&G Purchase Order, though "Claude [Newton, SCE&G's senior engineer] had told me that we were getting a purchase order." R.p. 339, lines 17-18. SCE&G did not require Anson to deliver a signed purchase order

prior to Anson beginning work and Anson never signed that document. R.p. 639, lines 2-8, p. 652, lines 2-9.

Anson intentionally did not sign the later-provided purchase order from SCE&G. R.p. 495, lines 11-15. The Purchase Order played *no* part in Anson's starting work on the job. As Pete Stutsman, the president of Anson, testified: "On this occasion we used our form because there was no paper that we had and they were ready to go. So we gave them an estimate and we moved forward based on their executing the estimate." R.p. 483, lines 17-22.

The procurement process used in this transaction did not follow SCE&G's normal process. Here, Anson's Quotation was used by both parties in lieu of a Request for Proposal ("RFP"), which was never issued in this case. R.p. 648, lines 22-25, p. 662, line 19-p. 663, line 4. SCE&G's Terms and Conditions were not sent to Anson prior to Anson submitting its Quotation; these terms and conditions are stated on the purchase order that normally accompanies a RFP. R.p. 647, line 23-p. 648, line 25. R.p. 688, line 8-p. 689, line 20. Neither SCE&G nor Anson ever signed the Purchase Order even though the P.O. requires that it be signed. When SCE&G signed Anson's Quotation on Friday, January 4, 2008, the only conditions, scope of work, and terms available to Anson were those provided in Anson's approved Quotation.

Moreover, there are significant differences between the Anson Quotation and the SCE&G Terms and Conditions. For example, Anson did not acquire the permits required for the construction, as required by ¶1:03 of the SCE&G Terms and Conditions - these were obtained by SCE&G. Anson did not provide the insurance certificate required by ¶ 1:25 and Attachment III; nor did it name "SCANA Corporation and its subsidiaries" as additional insureds under its

insurance policies, as required by Attachment III. The actions of Anson and SCE&G were, therefore, in direct conflict with the SCE&G Terms and Conditions.

Anson began work on the Dock Street project on the morning of Monday, January 7, 2008. R.p. 417, lines 3-4, p. 432, line 20-p. 433, line 2. At no time on Monday or Tuesday did Anson's job foreman, James Smith, report any problems with the installation of the vault. R.p. 412, lines 11-18, p. 431, lines 8-11. By the end of Tuesday, the trench box was in place in the ground and Anson was not aware of any complaints. R.p. 436, line 12-p. 437, line 13. On Wednesday, January 9, the City issued a stop-work order, alleging that the vault had been placed in the wrong location. R.p. 437, lines 14-17.

Subsequently, the French Huguenot Church filed a lawsuit against both Anson and SCE&G, alleging that damage had been done to their building during the course of the work. Both Anson and SCE&G settled with the Church.

Subsequently, on July 15, 2011, SCE&G filed and served a Summons and Complaint on Anson. The Complaint alleges causes of action for breach of contract, contractual indemnity and equitable indemnity. R.p. 11. On September 13, 2011, Anson filed and served its Answer. R.p. 43. In its Answer, Anson denied that it ever accepted the terms alleged by SCE&G, affirmatively asserted a different contract, and alternatively pled that no contract was formed. Determining the terms of the agreement between the parties has been a central issue in the litigation because the only document SCE&G can proffer with an alleged indemnity agreement is the unsigned P.O. and General Terms and Conditions that Anson rejected.

On July 16, 2013, SCE&G filed a motion for partial summary judgment, asking the court to hold that there was no disputed issue of material fact as to the contract between the parties. It asserted that the contract, without question, consisted of three parts: Anson's Quotation,

SCE&G's Purchase Order and SCE&G's General Terms and Conditions. By Response filed July 16, 2013, and at a hearing conducted on July 18, 2013, Anson opposed SCE&G's motion and presented voluminous documentary and testimonial evidence demonstrating a substantial question of fact.

A jury had been empanelled on July 22, 2013, when the Lower Court announced its decision on the Motion for Partial Summary Judgment. The Lower Court filed its written Order granting SCE&G's motion on July 23, 2013. R.p. 3. That Order was appealed immediately and the trial stopped.

In its Order, the Lower Court determined that three documents, Anson's signed Quotation, SCE&G's Purchase Order and SCE&G's General Terms and Conditions formed the contract between the parties. Despite more than a scintilla of evidence in the record that the signed Quotation was the entirety of the contract between the parties and that Anson did not agree to the terms contained in SCE&G's Purchase Order and General Terms and Conditions, the lower court granted summary judgment to SCE&G. In addition to determining that all three documents comprised the agreement between the parties, the lower court determined that it was the intent of the parties that additional documents would be executed and that those documents were in fact SCE&G's Purchase Order and General Terms and Conditions; a finding which is clearly disputed by the parties.

The Court of Appeals affirmed the Lower Court's holding in an unpublished opinion, 2015-UP-248, on May 13, 2015. Using a legal framework not previously argued, the Court of Appeals held that the Anson Quotation was merely an offer that was rejected by SCE&G by way of a counter-offer. The counter-offer, in the form of a P.O. and General Terms and Conditions, were then accepted by Anson by performance. In addition to this holding, and despite the patent

incongruity, the Court of Appeals also affirmed the Lower Court's 3-document framework and findings.

Anson filed a motion for rehearing, which was denied by the Court of Appeals on June 12, 2015. The Petition for a Writ of Certiorari timely filed.

ARGUMENT

I. BOTH THE COURT OF APPEALS AND THE LOWER COURT ERRED IN DETERMINING THE CONTRACT TERMS WHERE FAR MORE THAN A SCINTILLA OF EVIDENCE DEMONSTRATES A SIGNIFICANT ISSUE OF MATERIAL FACT ON NEARLY EVERY ELEMENT OF PROOF REQUIRED TO BE MET BY THE RESPONDENT.

A motion for summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment." Bruce v. Durney, 341 S.C. 563, 566, 534 S.E.2d 720, 722 (Ct. App. 2000) (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)). "Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence." Zurich American Ins. Co. v. Tolbert, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) citing Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009); see Froneberger v. Smith, 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013) citing Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Black's Law Dictionary (5th ed. 1979) defines "scintilla of evidence" as follows:

> **Scintilla of evidence**. A spark of evidence. A metaphorical expression to describe a very insignificant or trifling item or particle of evidence; used in the statement of the common-law rule that if there is any evidence at all in a case, even a mere *scintilla*, tending to support a material issue, the case cannot be taken from the jury, but must be left to their decision.

In the motion before the Lower Court, the issue was whether the contract between Anson and SCE&G included the General Terms and Conditions that were part of the unsigned Purchase Order. Anson denies that it accepted these terms and proffered significant documentary and testimonial evidence[1] demonstrating that it rejected these terms.

> When the existence of a contract is questioned and the evidence either conflicts or gives rise to more than one inference, the issue of the contract's existence becomes a question for the finder of fact. *See Small v. Springs Indus., Inc.*, 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987) (stating that under the common law, a trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence either conflicts or admits of more than one inference).

Sherman v. W & B Enterprises, Inc., 357 S.C. 243, 250, 592 S.E.2d 307, 310 (Ct. App. 2003).

> A contract is formed between two people when one gives the other sufficient consideration either to perform or refrain from performing a particular act. *Benya v. Gamble,* 282 S.C. 624, 321 S.E.2d 57 (Ct.App.1984). Offer and acceptance are essential to the formation of a contract. *Id.* (citing *Pierce v. Northwestern Mutual Life Ins. Co.,* 444 F.Supp. 1098 (D.S.C. 1978)). If the evidence is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury. *Benya.*

Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003).

For a contract to be formed, moreover, there must be a "meeting of the minds," i.e., an acceptance by both parties of the terms of the contract. As this Court has held:

> "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms

[1] All evidence and testimony cited herein was provided to the Court below at the hearings and is part of the Record in this case.

> of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (citation omitted) (emphasis in original); *see also* Potomac Leasing Co. v. Otts Mkt., Inc., 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987) ("It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms."). "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). In Player v. Chandler, the South Carolina Supreme Court asserted:
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> > The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.
>
> 299 S.C. at 105, 382 S.E.2d at 894.

Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (citation omitted).

There is no dispute that SCE&G accepted the contract Quotation offered by Anson. The disputed issue is whether that contract was modified or amended by SCE&G's proposed Terms and Conditions. As is discussed in greater detail below, the Anson Quotation was signed and delivered by SCE&G without modification. On this basis, Anson began work. Anson rejected the SCE&G Terms and Conditions because they included, *inter alia*, indemnity, risk transfer, and insurance provisions that were unacceptable to Anson. SCE&G did not require acceptance of its Terms and Conditions before allowing Anson to go to work, thus waiving any right to insist on these terms.

Despite an abundance of evidence of Anson's rejection of the SCE&G Terms and Conditions, the Court of Appeals ignored all inferences favoring Anson and determined what the parties intended the terms of the contract to be. This was clear error.

II. THE COURT OF APPEALS' CHARACTERIZATION OF THE SIGNED QUOTATION BY SCE&G AS NOTHING MORE THAN AN OFFER IGNORES, AND IS IN CONFLICT WITH, EXISTING CONTRACT LAW AND LONG-STANDING SUPREME COURT PRECEDENT.

With the Court of Appeals' version of events, there are now three interpretations of the facts surrounding the making of this contract and its legal effect, *to wit:*

- As argued by Anson: that the Anson Quotation was accepted by SCE&G and acted upon by Anson, and that the Purchase Order and General Terms and Conditions were an attempted unilateral modification that was rejected by Anson;

- As found by the Lower Court: that the Anson Quotation was accepted by SCE&G and that the Purchase Order. and General Terms and Conditions were contemplated at the time and were subsequently accepted by performance, and that all three documents must be read together;

- As found by the Court of Appeals: that the Anson Quotation was not accepted by SCE&G, and that the Purchase Order and General Terms and Conditions were a counter-offer that was accepted by Anson by performance.

Thus, the decision of the Court of Appeals proves the Petitioner's point—the documents that make up the contract and its terms is capable of more than one reasonable construction and must be determined by the trier of fact.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). "In a contract for services two essential terms are the scope of work to be performed and the amount of compensation." Stevens and Wilkinson of S. C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (*quoting* W.E. Gilbert & Assocs. v. S.C. Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985)). A contract is valid even if it is signed by only one party. Peddler, Inc. v. Rikard, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975). "It is

not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other." Id. (*quoting* Gladden v. Keistler, 141 S.C. 524, 524, 140 S.E. 161, 164 (1927)).

The Court of Appeals' Opinion characterizes Anson's signed Quotation as nothing more than an offer; however, the Opinion fails to address the significance and effect of SCE&G's signature on the Quotation. Anson's Quotation was the offer which was then signed and accepted by SCE&G thereby making it a valid and enforceable contract. *See* Peddler, Inc., 266 S.C. at 32, 221 S.E.2d 117.

According to well-established Supreme Court precedent, a contract is enforceable if there is a meeting of the minds and if it contains all essential and material terms. *See* Player, 299 S.C. at 105, 382 S.E.2d at 893. SCE&G's 30(b)(6) designee, Jesse Thigpen, Jr. testified that Claude Newton, SCE&G's head engineer, told him to sign Anson's Quotation. R.p. 340, lines 3-24. As a result, Mr. Thigpen testified that he signed the Quotation since he "knew [Anson was] anxious to start work. They were willing to do it. And we had an agreed upon price." R.p. 341, lines 13-15. Most importantly, Thigpen also testified that he "signed the document . . . *so that Anson could go to work*." R.p. 313, lines 24-25 (emphasis added). This admission by Thigpen clearly establishes that there was a meeting of the minds between SCE&G and Anson, thereby satisfying an essential element of contract formation under South Carolina law. *See* Kitchens v. Lee, 221 S.C. 59, 66, 69 S.E.2d 67, 69 (1952) ("A meeting of the minds . . . is, of course, essential for the formation of a legally enforceable contract.")

Notably, the signed Quotation contained all essential terms, including the scope of work ("Church Street Conduit Duct System and Pre-Cast Vault") and the amount of compensation ("$36,200.00"). R.p. 708. As such, the Quotation contained all essential and material terms to

make it an enforceable contract under South Carolina law. *See, supra,* Stevens and Wilkinson of S.C., Inc., 409 S.C. at 578, 762 S.E.2d at 701.

The Court of Appeals' Opinion seems to suggest that the Quotation did not contain the scope of work such that the fully executed contract in the form of the Quotation did not contain all essential and material terms to make it an enforceable contract. The Opinion does so by comparing language at the top of Anson's signed Quotation as being "for work" on the "Church Street Conduit Duct System and Pre-cast Vault" with language contained on SCE&G's Purchase Order which stated "Anson Construction Company, Inc. ('Contractor') shall provide labor, supervision, equipment and materials required to complete the installation of concrete vault for the Dock Street Theater project . . ." Notably, the Court of Appeals ignores the existence of those very same line items at the bottom of the signed Quotation. R.p. 708. To the extent that the Court of Appeals is suggesting that Anson's Quotation did not contain the scope of work; that is clearly contrary to the more detailed description of the work contained in Anson's signed Quotation, thereby making the signed Quotation a fully enforceable contract under South Carolina law.

Most importantly, the Court of Appeals' Opinion ignores the very existence and significance of SCE&G's signature on the Anson Quotation, instead characterizing this document as nothing more than an offer. A mere offer would not be signed by the offeree. Had the Quotation been unsigned by either party, the Court's Opinion that this document was nothing more than an offer by Anson to perform the work would be more consistent with our case law; however, the fact that SCE&G signed the Quotation, which contained all essential and material terms to make it an enforceable contract, clearly transformed the offer into a contract between the parties.

Furthermore, Anson testified that it held and acted upon the signed Quotation when it went to work on the project. R.p. 483, lines 19-20; p. 490, lines 2-9; p. 515, lines 19-20; p. 526, lines 17-18. As a result, under South Carolina law, because the Anson Quotation contained all material terms and conditions, was signed by SCE&G and held and acted upon by Anson, the Anson Quotation is the fully enforceable contract and was not merely an offer as the Court's Opinion has set out.

In light of the evidence in the record that Anson never accepted the SCE&G Purchase Order and General Terms and Conditions, it was error for the Lower Court and the Court of Appeals to make the factual determination that the contract contained an indemnity provision.

III. THE COURT OF APPEALS' OPINION ERRONEOUSLY FINDS THAT SCE&G'S PURCHASE ORDER AND GENERAL TERMS AND CONDITIONS WERE A COUNTEROFFER TO ANSON.

The Court of Appeals' Opinion affirming the grant of partial summary judgment to Respondent SCE&G is based on a position not advanced by the parties in their briefs, nor maintained by the parties during the course of litigation in the lower court. Rather, the Court of Appeals finds *sua sponte* that Anson's signed Quotation was a mere offer which SCE&G rejected by sending Anson a counteroffer in the form of a Purchase Order and General Terms and Conditions. This position was not proffered by either party, was not relied upon by the lower court, is not supported by the record and is contrary to long-standing Supreme Court precedent.

Because the Quotation, accepted by signature, constituted the fully enforceable contract under South Carolina law, SCE&G's Purchase Order and General Terms and Conditions cannot be a counteroffer. In evaluating the Court of Appeals' framework, the timing and sequence of the documents is essential to the correct characterization and meaning of SCE&G's Purchase Order and General Terms and Conditions.

Anson sent its offer (the Quotation) via facsimile to SCE&G on December 13, 2007. R.p. 706. The offer identified the scope of work and contained the total price of $36,200.00. Id. Per SCE&G's request, Anson updated the offer adding a breakdown of the total price and faxed it to SCE&G on Thursday, January 3, 2008. R.p. 707. On the same day, SCE&G *requested that Anson begin work* on the project the following Monday, January 7, 2008. SCE&G, in the person of Jesse Thigpen, signed the contract on Friday, January 4, 2008. R.p. 708 (emphasis added). At some time after SCE&G executed the contract on Friday, January 4, 2008, SCE&G sent Anson a Purchase Order and its General Terms and Conditions via email. R.p. 493, line 25-p. 494, line 15; p. 523, line 8-14. The exact time SCE&G's documents were sent to Anson is unknown and not part of the record before this Court; however, as stated above, the exact timing and sequence of the document exchange is essential in determining the classification and characterization of SCE&G's documents.

If SCE&G sent Anson the Purchase Order and General Terms and Conditions before SCE&G signed Anson's Quotation, then Anson's insistence that SCE&G sign the Anson Quotation constituted a rejection by Anson of SCE&G's counteroffer. However, if SCE&G sent Anson the Purchase Order and General Terms and Conditions after Jesse Thigpen signed the Anson Quotation, those documents are an attempt to unilaterally modify the contract between the parties. Regardless, SCE&G's Purchase Order and General Terms and Conditions cannot be, and are not, a part of the agreed upon contract between the parties.

"Any modification of a written contract must satisfy all fundamental elements of a valid contract in order for it to be enforceable, including a meeting of the minds between the parties with regard to all essential terms of the agreement." ESA Servs., LLC v. S.C. Dept. of Revenue, 392 S.C. 11, 23, 707 S.E.2d 431, 438 (Ct. App. 2011) (*citing* Player, 299 S.C. at 104-105, 382

S.E.2d at 893). "[O]ne party to a contract may not unilaterally alter its terms." Lee v. Univ. of S.C., 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014) (*citing* 17A Am.Jur.2d Contracts § 507). "Indeed [o]nce [a] bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration." Id. (*quoting* Layman v. State, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2006)) (internal quotations omitted).

In its opinion, the Court of Appeals cited Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus., Inc., 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991), to support its position that SCE&G's sending a Purchase Order and General Terms and Conditions to Anson constituted a counteroffer and/or an acceptance that attempted to add to or vary the terms of Anson's Quotation. This position begins with the premise that Anson's signed Quotation was nothing more than a mere offer, which as detailed above ignores SCE&G's signature accepting the Quotation and their agreement to be bound to the terms of the contract. Because Anson's Quotation contained all the necessary material terms and conditions to make it an enforceable contract under South Carolina law, and SCE&G accepted Anson's Quotation by signing it, Anson's Quotation constituted a fully executed and enforceable contract between the parties that could only by modified by mutual agreement. The subject case is distinguishable from Weisz in that (1) this case involves the sale of services as opposed to the sale of goods; (2) Mr. Thigpen actually signed Anson's Quotation, whereas none of the documents exchanged between the parties in Weisz were ever signed; and, perhaps most importantly, (3) when Mr. Thigpen signed Anson's Quotation on behalf of SCE&G, he did not add different or additional terms, but rather signed Anson's Quotation as it was offered, thereby accepting the offer and forming the contract.

As is clear from the record, Anson's Quotation is the only signed document that exists between the parties. R.p. 708. While specifically requiring signatures by both parties, SCE&G's

Purchase Order is unsigned by either party. R. pp. 709-710. In spite of this clear and unequivocal requirement, the Court of Appeals ignores the existence and significance of the signed Quotation by erroneously concluding that the Purchase Order, which incorporates and refers to the SCE&G's General Terms and Conditions, was a counteroffer the terms of which Anson accepted by going to work. The Court of Appeals also ignores a plethora of testimony by Anson that it did not accept the terms of SCE&G's Purchase Order and General Terms and Conditions. R.p. 525, lines 1-5; p. 533, line 20-p. 534, line 4. In fact, Pete Stutsman testified on behalf of Anson, that Anson considered the signed Quotation to be the full agreement between the parties. R.p. 489, line 18-p. 490, line 9; p. 513, line 14-p. 515, line 20. To support its Opinion, the Court of Appeals erroneously quoted and mischaracterized testimony by Peter Stutsman stating that Mr. Stutsman "conceded the purchase order . . . *formed part of the contract with SCE&G.*" Opinion, May 13, 2015, p. 2 (emphasis added). This is simply not true. When specifically asked by counsel whether the "purchase order was part of the contract for the work Anson performed for SCE&G," Mr. Stutsman categorically stated "*No.*" R.p. 525, line 24-p. 526, line 3 (emphasis added).

The Court of Appeals' cite to Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) seems to suggest that because Anson received SCE&G's Purchase Order and General Terms and Conditions on Friday, three days before Anson went to work on Monday, it had time to consider these documents and explicitly reject them, but instead went to work and somehow impliedly accepted them by performance. This is erroneous. The record is clear that Anson went to work as a result of SCE&G signing and agreeing to the terms contained in Anson's Quotation, which was a fully enforceable contract under South Carolina law. Furthermore, the suggestion that a party can impliedly accept a proposed modification by

simple possession of documents and performance is contrary to long-standing South Carolina law on contract modification.

There is no evidence whatsoever that Anson accepted SCE&G's proposed modification and agreed to be bound by SCE&G's Purchase Order and General Terms and Conditions. Without evidence in the record that there was a meeting of the minds as to SCE&G's attempted modification, there can be no acceptance or incorporation of SCE&G's Purchase Order or General Terms and Conditions into the contract that already existed between the parties.

In addition, there cannot be an unambiguous right to indemnity, as this Court held, in favor of SCE&G, as there is not an indemnification provision in the signed Quotation, nor did Anson agree to SCE&G's proposed modification of the signed Quotation which contained the indemnification provision. Furthermore, because there was clearly not a meeting of the minds between Anson and SCE&G over SCE&G's proposed modification, then Anson could not, and did not accept SCE&G's modification by performance. As Pete Stutsman testified, Anson went to work because it had a signed document by SCE&G, the Anson Quotation. R.p. 483, line 24-p. 484, line 1. Accordingly, Anson's performance of the work was the result of a meeting of the minds that already took place when Jesse Thigpen, for SCE&G, accepted Anson's offer by signing it and agreeing to Anson going to work. There is no evidence that Anson accepted SCE&G's proposed modification of an existing contract and, therefore, there was no modification of the contract.

In addition, there could not be a modification of the contract because there was no consideration for any such modification. There is absolutely no evidence of additional consideration offered by SCE&G to Anson for SCE&G's attempted modification of the contract. It is not additional consideration to agree to do what a party has already agreed to and is already

bound to do. *See* Rabon v. State Finance Corp., 203 S.C. 183, 183, 26 S.E.2d 501, 503 (1943) ("a promise to do, or actually doing, no more than that which a party to a contract is already under legal obligation to do, is not a valid consideration . . ."). Because there was clearly no additional consideration offered by SCE&G for the proposed modification, SCE&G's documents cannot and did not modify the contract.

IV. THE COURT OF APPEALS' OPINION ERRONEOUSLY CONCLUDES THAT THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT ANSON'S POSITION THAT IT BEGAN WORK BASED SOLELY ON ITS QUOTATION, AND THUS REJECTED SCE&G'S TERMS AND CONDITIONS.

The Court of Appeals erroneously stated that there was no evidence in the record to support Anson's position that the signed Quotation was the sole document forming the contractual relationship between the parties and that Anson went to work based solely on that signed Quotation. Opinion, p. 3. The record is replete with testimony that not only did Anson not consider SCE&G's Purchase Order and General Terms and Conditions to be part of the contract for the work, but that Anson did in fact go to work solely based on its signed Quotation—which was its agreement with SCE&G. *See e.g.*, R.p. 475, lines 11-17; p. 481, line 3-p. 482, line 18; p. 514, line 10-p. 515, line 5; lines 19-20. As discussed *infra.*, Jesse Thigpen testified on behalf of SCE&G that he signed the Quotation so that Anson could go to work. R.p. 313, lines 24-25. Contrary to the Court of Appeals' finding that there is no evidence in the record to support Anson's position that it rejected SCE&G's terms and conditions, there is a plethora of testimony by both Anson and SCE&G that clearly supports Anson's position that its actions in going to work was an express rejection of SCE&G's terms and conditions and not an acceptance and agreement to an attempted modification.

V. THE COURT OF APPEALS' OPINION IS INTERNALLY INCONSISTENT BECAUSE IT ADOPTS THE HOLDING OF THE LOWER COURT THAT IS MUTUALLY EXCLUSIVE OF ITS OWN ANALYSIS.

While on the one hand the Court of Appeals characterizes the transaction as "Offer—Counter-offer—Acceptance," with the other hand it upholds the Lower Court's interpretation of "one contract in three parts." In other words, the Lower Court includes in the contract a document that the Court of Appeals finds was rejected by counter-offer.

The incongruity of the legal framework utilized by the Court of Appeals and the Lower Court occurred because the Court of Appeals based its decision on a legal theory of its own making. No party ever argued that the Anson Quotation was rejected or that Purchase Order and General Terms and Conditions were a counter-offer. To the contrary, the lower court's order granting summary judgment explicitly found that all three documents, including Anson's signed Quotation, ultimately formed the final contract between the parties. The parties extensively briefed this issue to this Court of Appeals and the parties' arguments focused on the import and relevance of language contained in Anson's signed Quotation which required the "execution of a non-modified AIA form or sub-contractor approved equal." In Respondent's Brief, SCE&G took the position that this requirement was the reason that its Purchase Order and General Terms and Conditions were part of the contract between the parties. In fact, SCE&G did not dispute that the signed Quotation was part of the contract between the parties; rather, it insisted that it was one of many documents which formed the basis of the agreement, including by incorporation, its unsigned Purchase Order and General Terms and Conditions.

To reach its conclusion, the Court of Appeals had to make factual determinations that are at clear odds with the record below and the decision of the lower court. Making such factual

determinations on an appeal arising from a Motion from Summary Judgment is not the province of the appellate court.

VI. DESPITE THE INCONGRUENCIES OF THE LEGAL FRAMEWORKS, THE COURT OF APPEALS ADOPTED THE LOWER COURT'S RULING AND SUMMARILY DISMISSED ALL OTHER ARGUMENTS RAISED BY ANSON.

A. The Court of Appeals failed to address Anson's position that it waived the condition precedent of a subsequent contract.

In response to SCE&G's incorporation argument, Anson argued first that the signed Quotation formed the entire contract between the parties. Anson further argued that, despite the presence of a condition precedent requiring the execution of a "non-modified AIA form or sub-contractor approved equal," the parties elected to waive this condition when SCE&G signed Anson's Quotation directing Anson to go to work. Anson cited several cases from other jurisdictions for the proposition that Anson and SCE&G waived the condition precedent when Anson went to work. *See* Just Wood Industries v. Centex Const. Co., Inc., No. 98-1855, 1999 WL 606859 (4th Cir. Aug. 12, 1999) (stating that "parties may freely waive conditions precedent by accepting performance"); *see also* Demeritt v. Springsteed, 204 N.C. App. 325, 329, 693 S.E.2d 719, 721 (2010) (*citing* Fletcher v. Jones, 314 N.C. 389, 333 S.E.2d 731 (1985) (explaining that a party may waive a condition precedent by performing on the contract despite knowledge that a condition has not occurred)); Old Mill Printers v. Kruse, 392 N.W.2d 621, 623 (Minn. Ct. App. 1986) (holding that "a party can waive a condition by receiving further performance form the other party, with knowledge that the condition has not been performed); Elephant Butte Resort Marina, Inc. v. Woolridge, 102 N.M. 286, 290, 694 P.2d 1351, 1355 (1985) (holding that a buyer's "own conduct of accepting and using the boat . . . waiv[ed] any argument as to the possibility of a remaining condition precedent to his performance as a buyer."). As in the foregoing cases, Anson maintains that the unfulfilled condition precedent

requiring the execution of a "non-modified AIA form or sub-contractor approved equal" was waived by the parties when Anson went to work and SCE&G accepted Anson's performance. Moreover, the condition in the Quotation requiring execution of subsequent documents was Anson's and because Anson did not insist on other documents being executed before going to work, it is clear the parties waived this condition and did not intend the condition to be an essential term of the contract.

B. The Court of Appeals failed to consider the undisputed facts in the record that the condition precedent was never actually satisfied since no "non-modified AIA form or sub-contractor approved equal" was ever executed by the parties.

If the condition precedent was not waived, the term was never satisfied. The term at issue required *execution* of a "non-modified AIA form or sub-contractor approved equal." The only signed document that exists between the parties is Anson's Quotation. There are no other *executed* documents between the parties for this work. Furthermore, a non-modified AIA form was never exchanged by the parties and is not a part of the record before this Court. This fact provides further evidence and support for Anson's position that the condition was not a requirement, and therefore was waived upon execution of the Quotation and Anson subsequently going to work.

C. The Court of Appeals failed to overturn the lower court's improper construction of the contract documents.

The lower court erred in "construing" together the inconsistent terms contained in the signed Quotation and SCE&G's Purchase Order and General Terms and Conditions. In doing so, the lower court relied on Wilbur Smith and Associates v. National Bank of South Carolina, 274 S.C. 296, 263 S.E.2d 643 (1980) and determined that the documents formed one contract. As pointed out extensively by Anson in its initial brief, Wilbur Smith is distinguishable from the

case at hand in that Wilbur Smith dealt with two executed contracts, both of which were essentially the same form with minor inconsistencies. It was also clear in Wilbur Smith that the parties intended that the two documents would be construed together. In the case at hand, there is only one executed contract between the parties, Anson's Quotation, and the intent of the parties is clearly in dispute as to any modification of that contract.

It is axiomatic that, in construing a contract, the cardinal rule is to give effect to the intention of the parties. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 178 (2013); Alexander's Land Co., LLC v. M&M&K Corp., 390 S.C. 582, 703 S.E.2d 178 (2010); McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009). It is also true that "[w]hen there is a question as to the intent of the parties, the interpretation of the contract is an issue of fact for the jury." Westminster Co., Inc. v. Wingo, 286 S.C. 244, 245, 332 S.E.2d 570, 571 (Ct. App. 1985) *citing* Black v. Freeman, 274 S.C. 272, 262 S.E.2d 879 (1980).

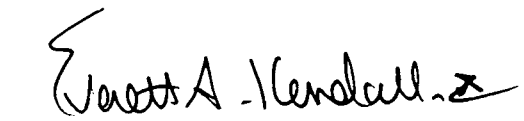
Because of the tremendous amount of material facts in dispute in this Record, neither the Lower Court nor the Court of Appeals should have determined what documents formed the basis of the contract between these parties. Instead, these issues should have been submitted to the jury—as the only trier of fact.

CONCLUSION

This case epitomizes the hazards of courts making factual determinations from disputed records. Not only did the Lower Court err in determining which documents formed the contract in the presence of far more than a scintilla of disputed evidence, but the Court of Appeals compounded the problem by adopting a mutually exclusive position from the Lower Court, while upholding its decision.

For the reasons set forth herein, and the additional factual and legal arguments contained in the Record, Anson respectfully asks this Court to grant a Writ of Certiorari to the Court of Appeals.

SWEENY, WINGATE & BARROW, P.A.



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August 3, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2015-001456

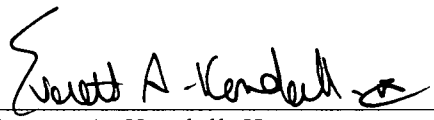
South Carolina Electric & Gas Co., ...Respondent,

v.

Anson Construction Co., ...Petitioner.

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d) of the South Carolina Rules of Appellate Procedure, I certify that a Petition for Rehearing in the above-referenced matter was filed with the Court of Appeals on May 28, 2015. The Petition was finally ruled on by the Court on June 12, 2015.



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PROOF OF SERVICE

I certify that I have served a copy of Appellant's Petition for Writ of Certiorari on South Carolina Electric & Gas Co. by depositing a copy of it in the United States Mail, postage prepaid, on August 3, 2015, addressed to its attorneys of record, listed as follows:

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