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**S.C. Supreme Court**

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. 2013-001623

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

v.

Anson Construction Co., ..... Petitioner

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

South Carolina Electric & Gas Co., Respondent,

v.

Anson Construction Company, Inc., Appellant.

Appellate Case No. 2013-001623

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Appeal From Charleston County  
J. C. Nicholson, Jr., Circuit Court Judge

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Unpublished Opinion No. 2015-UP-248  
Heard March 12, 2015 – Filed May 13, 2015

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**AFFIRMED**

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Everett Augustus Kendall, II and James Eric Cavanaugh,  
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Appellant.

John A. Massalon and Irish Ryan Neville, Wills  
Massalon & Allen, LLC, both of Charleston, for  
Respondent.

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**PER CURIAM:** Anson Construction Company appeals the circuit court's  
granting of partial summary judgment to South Carolina Electric & Gas Company  
(SCE&G) on its contractual indemnity claim. We affirm.

In granting partial summary judgment, the circuit court determined the documents governing the contractual relationship between Anson and SCE&G were: (1) Anson's quotation; (2) SCE&G's purchase order; and (3) SCE&G's terms and conditions. The terms and conditions containing the indemnity provision were not included in Anson's quotation. Anson argues the circuit court erred in granting summary judgment as a matter of law because the terms and conditions were not part of the contract between Anson and SCE&G. *See Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co.*, 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) ("The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." (citation omitted)).

We find Anson's quotation constituted an offer to SCE&G, SCE&G's purchase order and terms and conditions constituted a counteroffer, and Anson accepted SCE&G's counteroffer by performing the work. *See 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) ("[N]o contract is formed if the acceptance varies the terms of the offer. Instead, an acceptance which adds different or additional terms is treated as a counteroffer, which may be accepted or rejected by the other party." (internal citation omitted)). Paragraph 1:33 of SCE&G's terms and conditions provided, "[Anson] and [SCE&G] shall be bound by this CONTRACT and its terms and conditions . . . when [Anson] renders for [SCE&G] any of the services." Anson received SCE&G's counteroffer three days before beginning work on the project, and Peter Stutsman, the president of Anson, conceded the purchase order was received by Anson as "part of the document package" for the project and formed part of the contract with SCE&G. *See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) ("[W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial."). Thus, we find Anson accepted SCE&G's counteroffer on January 7, 2008, when it began to perform the work outlined in SCE&G's purchase order and attached terms and conditions. Therefore, the circuit court correctly concluded SCE&G's terms and conditions were part of the contract between the parties by operation of law.

Additionally, we find the documents exchanged between the parties unambiguously provided SCE&G with a right of indemnity. Anson's quotation to

SCE&G was "for work" on the "Church Street Conduit Duct System and Pre-cast Vault." SCE&G's purchase order stated "Anson Construction Company, Inc. ('Contractor') shall provide all labor, supervision, equipment and materials required to complete the installation of concrete vault for the Dock Street Theater project . . . ." The purchase order required Anson to perform the work "in accordance with . . . the attached General Terms & Conditions." The terms and conditions contained an indemnity provision in paragraph 1:26 and a clause in paragraph 1:33 stating the contract between the parties would be formed "when [Anson] renders for [SCE&G] any of the services." This language unambiguously provided SCE&G with a right of indemnity, and Anson accepted the terms of the contract by performing the work in accordance with paragraph 1:33.

Anson contends, however, the only document forming the contractual relationship between the parties was its quotation, which was accepted by SCE&G when Jesse Thigpen signed the document. Anson further asserts that it began work based solely on its quotation, and thus rejected SCE&G's terms and conditions. We disagree because there is no evidence in the record to support this position. Anson began work on the project three days after it received SCE&G's counteroffer. Thus, the circuit court was required to analyze SCE&G's purchase order and terms and conditions in determining what documents formed the contractual relationship between the parties. We find the circuit court properly considered all three documents exchanged between the parties to conclude Anson accepted and became bound by SCE&G's terms and conditions when Anson entered into the contract by performing the work.

Anson makes several other arguments as to why summary judgment was improper. We reject each of these on the basis that the circuit court properly considered all three documents together to conclude as a matter of law that SCE&G had a right of indemnity against Anson under the terms of their contract.

**AFFIRMED.**

**FEW, C.J., and HUFF and WILLIAMS, JJ., concur.**

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MAY 28 2015

APPEAL FROM CHARLESTON COUNTY  
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Appellate Case No. 2013-001623

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

v.

Anson Construction Co., .....Appellant.

APPELLANT'S PETITION FOR REHEARING

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## INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR, Appellant Anson Construction Company (“Anson”) respectfully petitions this Court for a rehearing of Opinion No. 2015-UP-248, dated May 13, 2015. Pursuant to the requirements of Rule 221(c), the Court’s Opinion has the effect of finally deciding the appeal, therefore Anson respectfully requests this Court grant its petition for rehearing in this matter.

This appeal arose out of the lower court’s grant of partial summary judgment to Respondent South Carolina Electric & Gas Co. (“SCE&G”) in which the lower court determined that all 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.

This Court’s Opinion rejected Anson’s arguments raised in its briefs and erroneously determined that Anson’s Quotation was a mere offer. Anson respectfully requests this Court grant its motion for rehearing as the Court’s determination that Anson’s Quotation was a mere offer is contrary to existing case law and long established Supreme Court precedent.

## SUMMARY OF ARGUMENT

This Court's Opinion is contrary to long-standing precedent and turns basic contract law on its head. The Court's characterization of the signed Quotation as nothing more than an offer ignores the undisputed fact that the Quotation was signed by SCE&G in the person of Jesse Thigpen and accepted, held and acted upon by Anson. As a result, the Opinion erroneously classifies SCE&G's Purchase Order and General Terms and Conditions as a counteroffer.

Anson's Quotation was signed for SCE&G by its agent, Jesse Thigpen. The signed Quotation contained all the necessary material terms and conditions required for an enforceable contract under long-standing South Carolina case law, and therefore, was the enforceable contract between the parties. SCE&G's Purchase Order and General Terms and Conditions can only be a counteroffer if they were sent to Anson prior to SCE&G signing the Anson Quotation. That is not the case. However, if that was the case, then SCE&G's act of signing Anson's Quotation constituted SCE&G's acceptance of Anson's offer, which then would have required a modification to change or alter the terms of the contract. On the other hand, if SCE&G sent the Purchase Order and General Terms and Conditions to Anson after SCE&G signed Anson's Quotation, then those documents can only be viewed as an attempt by SCE&G to unilaterally modify the terms of the contract, which Anson did not agree to. Regardless, this Court's Opinion classifying Anson's Quotation as an offer and SCE&G's Purchase Order and General Terms and Conditions as a counteroffer, flies in the face of long-standing contract law as stated by our Supreme Court.

Finally, in addition to the arguments summarized above and more clearly outlined below, Anson fully incorporates all arguments it made in both its Initial and Reply Briefs to this Court into this Petition for Rehearing.

#### ARGUMENT

#### I. THE COURT'S 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.

“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's Opinion characterizes Anson's signed Quotation as nothing more than an offer; however, the Court's Opinion fails to mention 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. As 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. Thigpen Dep., 54:3-24, June 26, 2012: 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." Thigpen Dep., 55:13-15; R. p. 341, lines 13-15. Most importantly, Thigpen also testified that he "signed the document . . . so that Anson could go to work." *Id.*, 27:24-25; 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 several terms, including the scope of work ("Church Street Conduit Duct System and Pre-Cast Vault") and the amount of compensation ("\$36,200.00"). Anson Signed Quotation, January 4, 2008; R. p. 708. As such, the Quotation contained all essential and material terms to make it an enforceable contract under South Carolina law. *See Stevens and Wilkinson of S.C., Inc.*, 409 S.C. at 578, 762 S.E.2d at 701.

The Court's 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 ignores the existence of those very same line items at the bottom of the signed Quotation. Anson Signed Quotation; R. p. 708. To the extent that the Court 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's 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. P. Stutsman Dep., 34:19-20, 41:2-9, 66:19-20, 77:17-18; 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.

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

The Court's 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 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. Notably, during the hearing before this Court, counsel for Respondent was asked whether the timing/sequence of the documents made a difference. That cogent question is particularly relevant now as the timing/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 via facsimile to SCE&G on December 13, 2007. Anson Quotation, 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. Anson Updated Quotation, 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. Anson Signed Quotation; 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. P. Stutsman Dep., 44:25-45:15, 74:8-14; 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 SCE&G's signing the Anson Quotation constituted a rejection by Anson of SCE&G's counteroffer, which cannot be the case since SCE&G signed the offer. 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 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 agreeing 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 be 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. Anson Signed Quotation; R. p. 708. While specifically requiring signatures by both parties, SCE&G's Purchase Order is unsigned by either party. SCE&G Purchase Order, January 4, 2008; R. pp. 709-710. In spite of this clear and unequivocal requirement, this Court 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 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. P. Stutsman Dep., 76:1-5, 84:20-85:4; 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. P. Stutsman Dep., 40:18-41:9, 64:14-66:20; R. p. 489, line 18-p. 490, line 9, p. 513, line 14-p. 515, line 20. To support its Opinion, the Court 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). However, 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.*" P. Stutsman Dep., 76:24-77:3; R. p. 525, line 24-p. 526, line 3 (emphasis added).

The Court's 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. P. Stutsman Dep., 34:24-35:1; 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.

III. THE COURT'S 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 erroneously states 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 agreement with SCE&G. *See e.g.*, P. Stutsman Dep., 26:11-17, 32:3-33:18, 65:10-66:5, 19-20; 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. Thigpen Dep. 27:24-25, R. p. 313, lines 24-25. Contrary to the Court's 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.

IV. BECAUSE THE COURT ERRONEOUSLY DECIDED THAT THE LOWER COURT CORRECTLY CONCLUDED THAT SCE&G'S TERMS AND CONDITIONS WERE PART OF THE CONTRACT BY OPERATION OF LAW, THE COURT'S OPINION SUMMARILY DISMISSES OTHER ARGUMENTS RAISED BY ANSON IN ITS BRIEFS AND DURING ORAL ARGUMENT.

In rejecting Anson's other arguments, the Court expressly found that the circuit court properly considered all three documents together to conclude as a matter of law that SCE&G had a right of indemnity against Anson. As indicated above, this finding ignores the existence and significance of SCE&G's signature on Anson's unaltered Quotation. The Court's overall basis for its finding is that it considered Anson's signed Quotation nothing more than a mere offer, which was rejected when SCE&G sent Anson a Purchase Order and its General Terms and Conditions, which the Court determined was a counteroffer, the terms of which Anson ultimately accepted by going to work. As

detailed above, Anson asserts that this determination and characterization of the documents is in error and clearly conflicts with existing case law.

However, contrary to the lower court's order granting summary judgment, the Court's Opinion does not appear to explicitly find 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 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.

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 this 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 (4<sup>th</sup> 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 from 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. Anson hereby incorporates all of its arguments made in its prior Memorandum, Briefs and at Oral Argument.

In considering this argument, it is also relevant that the condition required *execution* of a non-modified AIA form or sub-contractor approved equal. As has been consistently argued by Anson to this Court, 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.

Finally, Anson made the argument in its initial brief that 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.

With the existence of only one signed contract between the parties correctly characterized as such, the arguments advanced by Anson in its briefs are still relevant and applicable to the facts at hand. As a result, to the extent this Court determines that the parties contemplated the execution of additional documents Anson maintains that the condition precedent was waived when SCE&G signed Anson's Quotation and went to work based on SCE&G's acceptance of that offer. Moreover, it is clearly disputed by the parties which documents would have satisfied that condition and therefore a

determination of the parties' intent as a matter of law was clear error, thereby making the lower court's grant of partial summary judgment and this Court's affirming it inappropriate.

In summary, the arguments stated above were advanced by Anson before the lower court and on appeal before this Court. Anson restates these arguments here and fully incorporates all arguments made in its briefs and oral argument in this Petition.

#### CONCLUSION

In conclusion, this Court's Opinion is directly contrary to existing contract law and long-standing precedent in that it ignores the existence and significance of the only signed document between the parties. By ignoring the existence of the signed contract, this Court characterizes SCE&G's unilateral attempt to modify the contract as a counteroffer which it stated Anson accepted by performance. This is clearly in error and directly contrary to the facts in the record and our state's contract law. Furthermore, in characterizing SCE&G's attempted modification as a counteroffer, this court summarily and erroneously dismisses Anson's arguments regarding rejection and waiver and purportedly discerns the intention of the parties even in the face of a plethora of evidence disputing the documents that form the agreement between the parties.

For the foregoing reasons, Anson respectfully requests this Court grant its Petition for Rehearing, vacate its Opinion affirming the lower court's grant of partial summary judgment in this case and issue an opinion that is consistent with long-standing contract law in this state.

SIGNATURE PAGE TO FOLLOW

Respectfully submitted,



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Columbia, South Carolina

May 28, 2015

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2013-001623

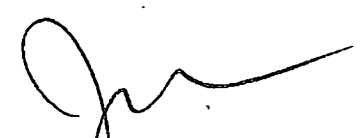
South Carolina Electric & Gas Co., .....Respondent,

v.

Anson Construction Co., .....Appellant.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that it has served a copy of the foregoing Petition for Rehearing on counsel for Respondent, John A. Massalon, Esquire, and I. Ryan Neville, Esquire, of Wills, Massalon & Allen, Post Office Box 859, Charleston, South Carolina 29402, by depositing a copy in the United States Mail.



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May 28, 2015

# The South Carolina Court of Appeals

South Carolina Electric & Gas Co., Respondent,

v.

Anson Construction Company, Inc., Appellant.

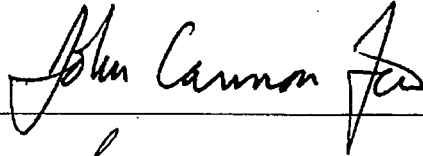
Appellate Case No. 2013-001623

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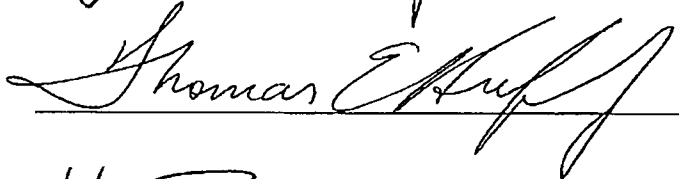
## ORDER

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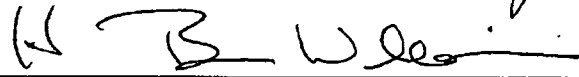
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

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James Eric Cavanaugh, Esquire  
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Irish Ryan Neville, Esquire  
The Honorable J. C. Nicholson, Jr.

**FILED**

June 12, 2015