THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2011-CP-10-5099

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S.C. SUPREME COURT

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

v.

Anson Construction Co., ...Petitioner.

BRIEF OF PETITIONER

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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 purported indemnity provision that SCE&G attempted to add into an already agreed upon contract which was the already accepted Anson's Quotation. The contract relates to the installation of an underground utility vault required for the relocation of transformers from the Dock Street Theater in Charleston to an underground vault in Church Street adjacent to the French Protestant Huguenot Church.

Anson began work on the Dock Street project on the morning of Monday, January 7, 2008. On Wednesday, January 9, the City issued a stop-work order, alleging that the vault had been placed in the wrong location. In 2008, the French Protestant 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 alleged causes of action for breach of contract,

contractual indemnity and equitable indemnity. R. p. 11. SCE&G relied on the terms and conditions in the SCE&G Purchase Order and General Terms and Conditions to argue that it was entitled to contractual indemnity. On September 13, 2011, Anson filed and served its Answer. R. p. 43. In its Answer, Anson denied that it ever accepted the terms in the SCE&G Purchase Order and General Terms and Conditions. Anson affirmatively asserted the Quotation contained all of the terms of the contract, and alternatively pled that no contract was formed.

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 contractual terms between the parties. SCE&G 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 for Partial Summary Judgment and presented voluminous documentary and testimonial evidence demonstrating a substantial question of fact that it had never accepted the terms contained in the SEC&G Purchase Order and General Terms and Conditions, but had specifically rejected those terms as being added to the already agreed upon terms of the contract which were contained in the Anson Quotation which had been accepted by SCE&G.

A jury had been empaneled 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 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 Anson.

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 (which ignored the fact that SCE&G signed the Quotation). The counter-offer, in the form of SCE&G's Purchase Order 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. In its opinion, the Court of Appeals held that the Anson Quotation was both rejected but also formed the contract.

Anson filed a motion for rehearing, which was denied by the Court of Appeals on June 12, 2015. The matter is now before this Court upon a Writ of Certiorari.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY REJECTING THE LOWER COURT'S FINDINGS OF FACT AND THEN MAKING FACTUAL DETERMINATIONS AS TO THE DOCUMENTS FORMING A CONTRACT BASED ON ITS OWN THEORY OF THE CASE DESPITE THERE BEING SUBSTANTIAL QUESTIONS OF FACT REGARDING THE INTENTION OF THE PARTIES UNDER EITHER THE COURT OF APPEALS' VIEW OF THE CASE OR THE LOWER COURT'S VIEW OF THE CASE.

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 SCE&G Purchase Order and General Terms and Conditions which were never accepted by Anson and the terms of which were specifically rejected by Anson.

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 (the Anson Quotation). 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 of this contract 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, and therefore a contract was entered into by the parties. R. p. 405, lines 5-10. Mr. 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 of SCE&G met Clay Stutsman of Anson on site to mark out the location of the vault, the only documents he had – and gave to Mr. Stutsman – 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 SCE&G Purchase Order and General Terms and Conditions 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 and General Terms and Conditions from SCE&G. R. p. 495, lines 11-15. The Purchase Order played *no* part in Anson's starting work on the job. As Mr. 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. Although the SCE&G Purchase Order and General Terms and conditions usually accompany an RFP, these documents were not sent to Anson prior to Anson's submitting its Quotation. 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 SCE&G Purchase Order and General Terms and Conditions, even though specifically required by its own terms. When SCE&G signed Anson's Quotation on Friday, January 4, 2008, the only conditions, scope of work, and terms available were those in Anson's Quotation, which became the contract between the parties upon acceptance by SCE&G.

The SCE&G Purchase Order and General Terms and Conditions would have modified and expanded the contract terms contained in the Quotation if they had been accepted. For example, under the SCE&G Purchase Order and General Terms and Conditions ¶1:03, Anson would have been required to obtain the construction permits, R. p. 713, yet SCE&G provided the permits to Anson when it delivered the executed contract. R. p. 314, lines 3-4. Paragraph 1:25 and Attachment III would have required

that Anson provide an insurance certificate that met the requirements of that provision and would have required Anson to name "SCANA Corporation and its subsidiaries" as additional insureds under its insurance policies. R. pp. 720 and 731. The contract that was signed by SCE&G, however, specifically stated that it "confines insurance coverage(s) to Anson Construction Co., Inc. and its employees." R. p. 708.

At issue in this litigation is the attempt to insert an indemnity provision into the contract by means of SCE&G's Purchase Order and General Terms and Conditions. The contract terms contained in the Quotation do not contain an indemnity clause. After SCE&G and Anson reached settlements with the French Protestant Huguenot Church, SCE&G made a demand on Anson for expenses and attorney fees associated with the earlier litigation asserting that Anson was contractually obligated to indemnify SCE&G. As Anson did not accept the terms of SCE&G's Purchase Order and General Terms and Conditions, there is no contractual indemnity obligation.

A. The Record on Appeal contains far more than a scintilla of evidence demonstrating that material issues of fact were presented to the lower court and the Court of Appeals, necessitating a denial of the Motion for Partial Summary Judgment.

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

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

- As found by the lower court: that the Anson Quotation was accepted by SCE&G and that the SCE&G Purchase Order and General Terms and Conditions were contemplated at the time and were subsequently accepted

by performance by Anson, and that all three documents must be read together and all three documents read together contain the terms of the contract;

- As found by the Court of Appeals: that the Anson Quotation was not accepted by SCE&G, and that the SCE&G Purchase Order and General Terms and Conditions were a counter-offer that was accepted by Anson by performance, and therefore the only terms to the contract are the terms contained in the SCE&G Purchase Order and General Terms and Conditions.

Thus, the decision of the Court of Appeals which rejected the lower court's findings of fact proves the Petitioner's point—the facts concerning the intention of the parties as to the documents that make up the contract and its terms are capable of more than one reasonable construction and must be determined by the trier of fact.

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 also 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 SCE&G General Terms and Conditions that were part of the unsigned SCE&G 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 [v. Gamble].

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

[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.

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 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: 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.
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> 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 in the form of the Quotation offered by Anson. The disputed issue is whether that contract was modified or amended by SCE&G's Purchase Order and General Terms and Conditions. As is discussed in greater detail below, the Anson Quotation was signed by SCE&G and returned to Anson without modification. On this basis, Anson began work. Anson

rejected the SCE&G's Purchase Order and General 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 facts and inferences favoring Anson and determined what the parties intended the terms of the contract to be. This was clear error.

B. 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.

The Anson Quotation became a valid contract when it was signed by SCE&G and returned to Anson. "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. at 105, 382 S.E.2d at 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 at 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, Mr. 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").[2] R. p. 708. As such, the Quotation contained all essential

[2] The Court of Appeals' Opinion seems to suggest that the Quotation did not contain the scope of work such that there was a fully executed 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,

and material terms and it was enforceable as a 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 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 of Appeals' finding 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, clearly established the intention that it was to be the contract between the parties.

Anson testified that it acted upon this contract 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. Under South Carolina law, the Anson Quotation contained all material terms and conditions. The Quotation was signed by SCE&G. The Quotation was held and acted upon by Anson. The Anson Quotation is the fully enforceable contract and was not merely an offer as the Court of Appeals' Opinion has set out.

C. The Court of Appeals' opinion erroneously finds that SCE&G's Purchase Order and General Terms and Conditions was a counteroffer to Anson.

The Court of Appeals' Opinion affirming the grant of partial summary judgment to SCE&G was based on a position not advanced by the parties in their briefs, and a position not maintained by any party during the course of litigation in the lower court,

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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 detailed description of the work contained in the Anson signed Quotation.

and was clearly incorrect. The Court of Appeals found *sua sponte* that Anson's signed Quotation was a mere offer which SCE&G rejected by sending Anson a counteroffer in the form of the SCE&G 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 signed the contract on Friday, January 4, 2008. R. p. 708 (emphasis added). Sometime after SCE&G executed the contract on Friday, January 4, 2008, SCE&G sent Anson the SCE&G Purchase Order and 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.

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 SCE&G 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 SCE&G Purchase Order and General Terms and Conditions after SCE&G 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 104-05, 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) SCE&G 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 SCE&G signed Anson's Quotation, it 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 in the SCE&G's Purchase Order and General Terms and Conditions that it must be signed by both parties to be effective, the Court of Appeals ignored the existence and significance of the signed Quotation by erroneously concluding that the Purchase Order, was a counteroffer the terms of which Anson accepted by going to work. The Court of Appeals also ignored 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, Mr. 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 Mr. 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' cited to Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) and seemed 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, in favor of SCE&G, as there is not an indemnification provision in the signed Quotation, and Anson did not 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 Mr. 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 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 proposed documents cannot and did not modify the contract.

D. The Court of Appeals' opinion erroneously concluded that there was no evidence in the Record to support Anson's position that it began work based solely on its Quotation, and had 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 Anson never agreed that the SCE&G's Purchase Order and General Terms and Conditions were part of the contract for the work, but that Anson in fact went 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.

E. 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 - Rejection - 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 the SCE&G 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 to the Court of Appeals, 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 with 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.

II. THE COURT OF APPEALS ERRED BY AFFIRMING THE LOWER COURT'S DETERMINATION THAT THREE SEPARATE AND INCONSISTENT DOCUMENTS, ONLY ONE OF WHICH WAS SIGNED BY ANY PARTY, MADE UP AN ENFORCEABLE CONTRACT.

Like the Court of Appeals, the lower court also made findings of fact on a record of disputed evidence. See discussion at Section I.A. regarding the scintilla of evidence

standard. Since the lower court also erred and the Court of Appeals in part relied on the lower court's Order, the errors in the lower court's Order will also be addressed.

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 which 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.

A. Whether the SCE&G Terms and Conditions are part of the contract is a disputed issue, and thus, an issue of fact, and therefore, summary judgment should not have been granted.

Despite an abundance of evidence of Anson's rejection of the SCE&G Terms and Conditions, the lower court ignored all inferences favoring Anson and determined what the parties intended the terms of the contract to be even though Anson denied that such was intended. This was clear error.

1. There is no evidence that Anson ever accepted SCE&G's Terms and Conditions.

The lower court's seven-page order, filed July 23, 2013, cited no words or action by which Anson accepted SCE&G's Terms and Conditions. Rather, the lower court skipped from references to the offer of the SCE&G Purchase Order and General Terms

and Conditions to the conclusion that Anson "agreed" to its terms. See R. pp. 4-5. The Court does not cite any evidence from the Record to support that conclusion, and there is no such evidence.

a. Performance of the work defined in the signed Quotation is not evidence of the acceptance of terms of different terms.

Although there is no finding in the Court's Order that Anson accepted SCE&G's Terms and Conditions, the Court, in order to make the ruling it did, presumably found that Anson accepted the Purchase Order and the SCE&G Terms and Conditions as part of the contract, although there is no evidence to substantiate in what manner this acceptance occurred.

The Court appears to find that since Anson undertook the work, Anson intended to accept the SCE&G Terms and Conditions. Paragraph 17 of the Order provides as follows:

> 17. Paragraph 1:30 provides that "[SCE&G] and [Anson] shall be bound by this contract and its terms and conditions when Anson executes and returns the unaltered, purchase order acknowledgement or when [Anson] renders for [SCE&G] any of the services or delivers to [SCE&G] and of the items required herein."

R. p. 5. The Court appeared to assume that Anson's work on the job site was conclusive proof of Anson's intention to accept SCE&G's Terms and Conditions. R. p. 5. This is a logical and legal fallacy and ignores undisputed facts.

The Anson Quotation agreed to by both parties anticipates that Anson would undertake the work. The SCE&G's Terms and Conditions, which Anson denied was part of the contract, also anticipated that Anson would undertake the work. Anson did undertake the work. It is completely reasonable to infer (as was precisely the case) that

Anson was acting in performance of the Anson Quotation (the executed contract) as those actions were provided for by Anson's Quotation and the Anson Quotation had been specifically agreed to and executed by SCE&G. R. p. 310, line 24-p. 314, line 5, p. 340, line 12-p. 341, line 23.

The assumption that Anson accepted SCE&G's Terms and Conditions by beginning the work is wholly unsupported by the testimony of both SCE&G and Anson personnel. SCE&G's Jesse Thigpen, the man who signed Anson's Quotation indicating SCE&G's approval, testified that he "signed [Anson's Quotation] so that Anson could go to work." R. p. 313, lines 24-25. He testified that he gave Whit Stutsman (the Anson representative) "a copy of the permits and that document [i.e., the signed Quotation]. R. p. 314, lines 3-4. This is significant since SCE&G obtaining the permits would have been in direct contravention to SCE&G's Terms and Conditions since the SCE&G Terms and Conditions would have required Anson to obtain the permits not SCE&G. Mr. Thigpen also testified that he did not have a copy of the Purchase Order when he went to the location and pointed out the location of the vault to Anson. The only documents he had when he reached a meeting of the minds with Anson's representative were Anson's Quotation and the permit. R. p. 339, line 13-p. 340, line 2. Pete Stutsman testified similarly on behalf of Anson. He testified that Anson offered the Anson Quotation to SCE&G "and they signed it and accepted it, and we went to work based on that document." R. p. 483, line 24-p. 484, line 1. Anson's performance was, therefore, dependent solely on the Anson Quotation, which was the agreement Anson had reached with SCE&G. Therefore, Anson's performance did not indicate its acceptance of SCE&G's Purchase Order or SCE&G's Terms and Conditions.

Therefore, the lower court erred in holding that Anson accepted SCE&G's Terms and Conditions merely by undertaking the work. Anson undertook the work in conformance with the contract it entered into with SCE&G, i.e., the Anson Quotation. At the very least, the matter should have been submitted to the jury, and the Court erred in granting SCE&G's Motion for Summary Judgment.

b. Submitting invoices bearing the purchase order number is not conclusive evidence of Anson's intention to accept the Terms and Conditions.

Without specifically saying so, the lower court appeared to rely on Anson's use of a purchase order number on its invoices to draw the inference that Anson intended to accept SCE&G's Terms and Conditions. R. p. 5. The reference to the purchase order number *after* completion of work should not be considered as conclusive evidence of acceptance of terms contained in a separate document, *i.e.* SCE&G's Terms and Conditions. Moreover, because this is not the only inference that can be drawn from that evidence, the issue of the intent of the parties must be submitted to the jury.

The testimony of both SCE&G and Anson employees was that the purchase order number was simply an administrative number to connect the financial system with the appropriate project. Randy Morris, an SCE&G 30(b)(6) deponent, who has been a procurement agent for SCE&G for twenty-three (23) years, testified as follows:

> Q: Is the purpose of a purchase order number to get for a vendor to get paid, is that how they reference getting paid?
>
> A: Yes. To identify the purchase order number on them, all invoices. The purchase order and then the purchase order number itself also is, from my viewpoint ties that invoice back to our contract.

R. p. 696, lines 1-7. Donnie Graham, another SCE&G 30(b)(6) deponent, and SCE&G's Manager of Strategic Sourcing, also testified:

Q: And does your system use that purchase order as the, basically a job tracking number?

A: That's correct.

Q: So that once that vendor, if the vendor wants to get paid it needs to associate its invoice with a purchase order number?

A: That's correct.

Q: And then accounting knows that is an okay, a bill that's okay to pay?

A: That's correct.

R. p. 637, line 1-10.

The testimony of responsible SCE&G employees confirms the testimony of Pete Stutsman, president of Anson Construction, who testified as follows:

Q: Okay. All right. And what is Anson's position on this purchase order that we're looking at right here? Does it have no bearing on the agreement?

A: It was a vehicle to which we used to get paid

***

Q: Why didn't you just submit an invoice without the purchase order?

A: Because they won't pay us without it.

R. p. 493, lines 14-19, 22-24.

Despite this testimony in the depositions presented, the lower court seemed to rely on the use of the purchase order number in order to find that Anson accepted SCE&G's Terms and Conditions. However, the testimony is clear that the use of a purchase order number was only an internal accounting function for SCE&G and SCE&G cannot shoehorn in additional un-agreed to Terms and Conditions by Anson's use of a SCE&G required purchase order number. If that were the case, then any party could unilaterally change the terms of a contract at any time by printing a form with a required purchase

order number on the front and then printing on the back of a form any terms that it wished it had in its original contract. At the absolute minimum, the use of such a technique creates a jury question as to whether Anson's use of a particular number unequivocally proved its acceptance of the terms of the purchase order (that was unsigned by Anson).

The inference that the use of the purchase order number was not intended to communicate acceptance is further bolstered by the prior course of dealing between these parties. The Record is clear that there was no consistent course of dealing between SCE&G and Anson as to the process for entering contracts or the forms involved. SCE&G's procurement agent, Randy Morris, testified that the utility's dealings with Anson Construction have varied from project to project. R. p. 693, line 8-p. 694, line 5; R. p. 695, lines 6-12; R. p. 697, lines 6-14; R. p. 699, lines 7-20. He testified that the project at issue was a sole source procurement based on the exigency of time and was out of any normal procurement process.

Likewise, Pete Stutsman testified that there was wide variation in the processes used by SCE&G to obtain Anson's services. R. p. 608, line 18, 22-p. 609 lines 9, 22-23, 25-p.610 line 15.

Despite the differences in process and forms, it was common for SCE&G to issue a purchase order number that Anson referenced in seeking payment. In his deposition, Mr. Stutsman testified that "it is not uncommon for SCE&G to send a purchase order to us and in order for billing purposes that we would use that purchase order number to be able to get paid. But based on what we had been told from the people at SCE&G what to do, how we're going to do it, we would bill against that purchase order and send the bill

in that SCE&G would have sent to us for billing purposes." R. p. 478, line 22-p. 479, line 4.

Thus, it is clear from the record that the relationship between SCE&G and Anson featured a wide variety of processes under which SCE&G obtained Anson's services. It is also clear that both SCE&G and Anson regarded the purchase order number as a tracking number – not a term of the contract. Therefore, whether the use of the purchase order number in this instance was intended as an indication of acceptance of the Terms and Conditions is clearly a question for the jury.

2. The predominant evidence in the Record is that Anson rejected SCE&G's Terms and Conditions.

As pointed out *supra*, Peter F. Stutsman, the president of Anson Construction, testified that SCE&G had never previously signed an Anson proposal. R. p. 610, lines 9-12. He testified that SCE&G was in a hurry to get the job started, as "the Dock Street Theater was ready to go ... [T]hey said let's go to work and we did." R. p. 475, lines 17-21. Given the situation, Anson considered their SCE&G-executed Quotation as the contract document and went to work on that basis. R. p. 475, lines 11-17, p. 481, line 3-p. 482, line 18. As Mr. Stutsman testified, "they [SCE&G] signed it and accepted it, and we went to work based on that document." R. p. 481, line 23-p. 482, line 1.

When Anson presented its Quotation and SCE&G executed it, Anson did not have a purchase order from SCE&G. R. p. 481, p. 33. On the same date that SCE&G signed Anson's Quotation, January 4, 2008, SCE&G e-mailed Anson a purchase order. R. p. 493, line 25-p. 494, line 15. Anson never signed the Purchase Order and SCE&G never required Anson to sign it before the work began on January 8, 2008. R. p. 495. Furthermore, Mr. Stutsman testified that he did not sign SCE&G's Purchase Order and

thereby he did not consent and did not agree to SCE&G's General Terms and Conditions because "we already had a signed agreement." R. p. 495, lines 11-15.

This act of declining to sign SCE&G's Purchase Order was, therefore, a conscious rejection of the Terms and Conditions referenced in that Purchase Order. Stutsman testified to this effect:

> Q: Now, why was another document not signed in this transaction?
>
> A: I didn't think we needed to sign another document. We had it. We had a document signed and those were the terms.

R. p. 513, lines 14-18.

There is certainly more than a scintilla of evidence that Anson specifically rejected SCE&G's Terms and Conditions. SCE&G's apparent assumption that the SCE&G Terms and Conditions were part of the contract, despite the purchase order never having been signed by Anson, certainly does not establish that there was a meeting of the minds between the parties, and therefore, Summary Judgment should not have been granted.

B. The Court of Appeals summarily dismissed arguments that the lower court erred in seeking to merge two inconsistent contract forms by deciding the intent of the parties notwithstanding facts and inferences favoring the non-moving party.

Having erroneously concluded that the SCE&G's Purchase Order and General Terms and Conditions were agreed to by Anson, the lower court then purported to "construe" the documents to give all of the terms their "full meaning and effect." In doing so, the lower court again ignored undisputed facts against a single document, construed inferences only in favor of SCE&G, and erroneously applied the law. In paragraph 10 of its Order, the lower court concluded that SCE&G's signing its

acceptance of Anson's Quotation included an agreement "that other documents would be forthcoming that would also govern the Parties' relationship." That holding is based on a faulty construction of provision 2 in Anson's Quotation, which stated that, "[t]his proposal is subject to execution of a non-modified AIA form or subcontractor approved equal." R. p. 708.

1. Paragraph 2 of the Quotation is a condition precedent to performance that was waived by SCE&G and Anson by virtue of performance under the Quotation.

Under South Carolina law, conditions precedent to the performance of contract may be waived. Brown v. State Farm Mut. Auto. Liability Ins. Co., 233 S.C. 376, 384, 104 S.E.2d 673, 677 (1958). While South Carolina courts have not addressed the issue of whether a party's performance on a contract waives unexecuted conditions precedent, several jurisdictions that have addressed this issue have held that a party may waive a condition precedent by performing on a contract.

The United States Court of Appeals for the Fourth Circuit held that "parties may freely waive conditions precedent by accepting performance." Just Wood Industries v. Centex Const. Co., Inc., No. 98-1855, 1999 WL 606859 at *9 (4th Cir. Aug. 12, 1999). In Just Wood, the court ruled that a construction company waived a condition precedent to a contract by accepting the work of a subcontractor before the condition was met. Id. Similarly, the North Carolina Court of Appeals explained that a party may waive a condition precedent by performing on the contract despite knowledge that a condition has not occurred. Demeritt v. Springsteed, 693 S.E.2d 719, 721 (N.C. Ct. App. 2010) (citing Fletcher v. Jones, 333 S.E.2d 731 (N.C.1985)). The Fletcher Court held that a seller waived a closing date by repeatedly assuring the buyer that he would sell the land up to

five months after the closing. Id. The court reasoned that the seller's willingness to perform on the contract after the closing date indicated his intent to waive the condition of closing by a specific date. Id.

The Court of Appeals of Minnesota held that "a party can waive a condition by receiving further performance from the other party, with knowledge that the condition has not been performed." Old Mill Printers v. Kruse, 392 N.W.2d 621, 623 (Minn. Ct. App. 1986). In Old Mill, the court found that a purchaser waived a condition precedent of notice by allowing a printing company to continue a printing job after he discovered a color run in the printing. Id. Although the purchaser knew that the printing company had not given him notice of the run, he permitted the company to finish the job. Id. Therefore, the purchaser waived the condition of notice and could not raise the nonperformance of the condition as a defense in the lawsuit. Id.

The Supreme Court of New Mexico held that a party's performance on a contract may waive a condition precedent. Elephant Butte Resort Marina, Inc. v. Wooldridge, 102 N.M. 286, 290, 694 P.2d 1351, 1355 (1985). In Elephant Butte Resort Marina, a buyer purchased a boat and used it for one month before attempting to rescind the contract based on the failure of a condition precedent. Id. The court held that the 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." Id.

These cases show that a party waives unfulfilled conditions precedent by performing on a contract. Because a party could have raised the issue of the condition precedent before accepting or tendering performance on a contract, courts imply a waiver of the condition based on performance.

It is undisputed that Anson's Quotation is the only signed document that exists between the parties. It is also undisputed that there is no **executed** "non-modified AIA form or subcontractor approved equal." It is further undisputed that Anson went to work, and SCE&G permitted Anson to go work, in the absence of any such subsequent document. As such, the condition precedent contained in Anson's Quotation that required the execution of a subsequent "non-modified AIA form or subcontractor approved equal" was waived by the parties.

Additionally, as the drafter of the Quotation, the condition requiring execution of a subsequent document was Anson's, not SCE&G's; therefore, as Anson did not require, and SCE&G did not insist upon an AIA document being executed prior to Anson commencing work, it is clear that both parties did not consider this to be an essential condition precedent to the contract. Furthermore, the fact that SCE&G allowed Anson to proceed with its work despite the non-execution of the AIA document is clear evidence that SCE&G did not consider that to be essential to the parties agreement, and therefore SCE&G clearly appears to have consciously waived that condition.

Because the evidence in the Record supports the inference that the condition precedent was waived by the parties, the lower court erred in applying Paragraph 2 to permit the merger of the two forms.

2. The SCE&G Terms and Conditions do not satisfy the requirements of Paragraph 2 of the Quotation for an executed "non-modified AIA form or subcontractor approved equal."

The lower court erroneously held that the SCE&G Purchase Order and General Terms and Conditions, as an undisputable fact, was the document contemplated by Paragraph 2. R. p. 8. This is clear error. First, and most obviously, the explicit language

of the condition precedent referenced the "execution" of a subsequent document. It is undisputed that there is no signed document, i.e., no execution of another document other than the Quotation.

Secondly, neither of the SCE&G documents – the Purchase Order nor the General Terms and Conditions – are a "non-modified AIA form"[3] or a "subcontractor approved equal," as spelled out specifically in Anson's Quotation. Moreover, there is no evidence in the record that SCE&G's Purchase Order and General Terms and Conditions are in any way the equivalent of any AIA form or that Anson accepted or approved any other document to supplement or replace its Quotation.

Nevertheless, the lower court held that the interpretation that there was no document that supplemented the contract was "not supported by a plain reading of the terms of the quotation," R. p. 8, and "[t]he only reasonable interpretation of the Quotation which takes into account all of the terms of that document is that paragraph 2 of the Quotation referred to the Purchase Order..." R. p. 8. The Order thereby ignored the terms of the Quotation that specifically required a "non-modified AIA form" or "subcontractor approved equal." R. p. 708.

If the language of Paragraph 2 means something other than what it plainly says, then it is necessarily ambiguous and its meaning should be determined by a jury. Our law holds that "a contract is ambiguous when its terms are reasonably susceptible to more than one interpretation". Proctor v. Steedley, 398 S.C. 561, 573 n.8, 730 S.E.2d 357, 363 n.8 (Ct. App. 2012) (quoting South Carolina Dept. of Natural Resources v. Town of

[3] The Architects Institute of America publishes a catalogue of forms for use by owners, architects, general contractors and sub-contractors. These forms are generally lengthy and very detailed. However, no exemplar AIA form was placed into the Record by SCE&G to show the equivalence to its proposed Terms and Conditions.

McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001)). The determination of whether a contract is ambiguous is a question of law for the court. Id.

In this case the lower erred in *de facto* holding that Anson's Quotation was unambiguous, yet it gave a totally different interpretation to the terms of the contract and the situation regarding supplementary documents than did the drafter of the Quotation. See R. p. 508, line 5-p. 509, line 3. Clearly the intention of Anson – which a court should be seeking, Wallace v. Day, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010) – is expressed consistently by the words of the Quotation and the testimony of its author.

If the terms of Anson's Quotation – which is the keystone of the agreement between the parties – are ambiguous, the question is one of intent for the jury, which had already been empaneled. R. pp. 268-270. Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co., 401 S.C. 395, 399-400, 736 S.E.2d 863, 865 (Ct. App. 2012) ("Where the terms of a contract are clear and unambiguous, its construction is for the court; but where the terms are ambiguous the question of the parties' intent must be submitted to the jury"). Accordingly, the lower court erred in granting summary judgment.

3. The Lower Court erred in "construing" together the two inconsistent contract forms.

The lower court relied upon Wilbur Smith and Associates v. National Bank of South Carolina, 274 S.C. 296, 263 S.E.2d 643 (1980), to construe both the Quotation and the SCE&G Purchase Order and General Terms and Conditions together as one contract. The essential facts of that case are distinguishable here.

In Wilbur, a dispute arose between the appellant bank and the respondent real estate company following the death of the seller over the payment of a commission for the sale of real property. Wilbur, 274 S.C. at 297-98, 263 S.E.2d at 644. Prior to his

death, the seller in Wilbur executed two exclusive listing agreements with the respondent real estate broker in which the seller agreed that the respondent had the exclusive right to sell the property for 15 years. Id. Seller also agreed to pay commission to the respondent real estate broker as compensation for the sale of real property. 274 S.C. at 298, 263 S.E.2d at 644. In the first agreement, the parties left open the sales price of the property and typed-in a provision making the agreement binding on heirs and assigns. Id. More than a year later, the parties executed another agreement which was exactly similar in form and substance with the only difference being that the parties set a sales price and made no reference to heirs and assigns. Id. Following the death of the seller, the appellant bank became executor of the seller's estate and sold the property through another real estate broker for less than the agreed upon listing price. Id. In confirming the decision of the lower court, the Supreme Court found that the two similar executed agreements should be read together in order to determine the parties intentions with regard to the right of the respondent real estate broker to receive a commission. Id.

The lower court relied on this case to find that the two forms were like that in Wilbur. However, Wilbur is distinguishable because the parties in Wilbur actually signed and executed two contracts. Anson and SCE&G only executed one signed contract (the Quotation). Additionally, in Wilbur the second agreement was only meant to supplement the first agreement by filling in the price term, while in the subject case, SCE&G's Purchase Order and General Terms and Conditions purportedly were meant to replace entirely the January 4, 2008 contract.[4] Moreover, the parties in Wilbur used the same form for both agreements, while Anson's Quotation and SCE&G's Purchase Order and

[4] The Court concluded, without discussion or support from the Record, that the subsequent document contemplated by Paragraph 2 of the Quotation will be added to, rather than replace, the terms of the Quotation.

General Terms and Conditions are entirely different documents and have directly conflicting terms.

The Wilbur Court's analysis is all predicated on the fact that the parties **intended** that there would be two documents that would be construed together. This intention was not in dispute. Here, the intention of the parties is clearly in dispute and the differences pointed out above support the inference that the merger of the two documents was not intended. Therefore, the lower court erred in applying the holding in Wilbur to this case. It was for the jury to determine which documents formed the contract.

CONCLUSION

This case epitomizes the hazards of courts making factual determinations from disputed records. The lower court erred in adding additional terms to the contract in the form of two more documents not accepted and not agreed to by ; and this in the presence of far more than a scintilla of disputed evidence. Then the Court of Appeals compounded the problem by adopting a mutually exclusive position from the lower court, while upholding its erroneous decision.

For the reasons set forth herein, and the additional factual and legal arguments contained in the Record, Anson respectfully asks this overturn the holdings of both the Court of Appeals and the lower court and remand the case for trial before a jury on all issues.

Respectfully submitted,

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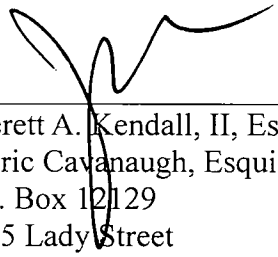

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September 16, 2016

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

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

Case Nos. 2011-CP-10-5099

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

v.

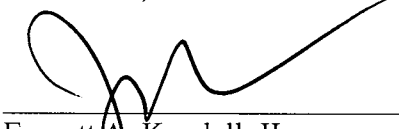
Anson Construction Company, ...Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with Rule 11(b), SCACR.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



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