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

Case No. 2011-CP-10-5099

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

v.

Anson Construction Co., ...Appellant.

FINAL

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

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

On July 15, 2011, SCE&G filed and served a Summons and Complaint on Anson. The Complaint alleges causes of action for breach of contract, contractual indemnity and equitable indemnity. Compl., July 15, 2011; R. pp. 10-42. On September 13, 2011, Anson filed and served its Answer. Answer, Sept. 13, 2011; R. pp. 43-48. In its Answer, Anson denied that it ever accepted the terms alleged by SCE&G, affirmatively asserted a different contract, and alternatively pled that no contract was formed. Determining the terms of the agreement between the parties has been a central issue in the litigation.

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

A jury had been empanelled on July 22, 2013, when the Trial Court announced its decision on the Motion. The Trial Court filed its written Order granting SCE&G's motion on July 23, 2013. Order Granting Mot. Partial Sum. J., July 23, 2013; R. pp. 3-9. That Order was immediately appealed and the trial stopped.

FACTS

This litigation arose from Respondent SCE&G's desire to relocate transformers from the Dock Street Theater in Charleston to an underground vault in Church Street. Jesse Thigpen Dep. 19:12–20:14, June 26, 2012; 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. Claude Newton Dep. 9:7-24, 17:16-18:11, May 18, 2012; R. p. 357, lines 7-24; p. 365, line 16-p. 366, line 11; Thigpen Dep. 18:13–23, 21:1-17; 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. Newton Dep. 31:4-32:11; 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. Thigpen Dep. 24:2-25:22, R. p. 310, line 2-p. 311, line 22; Clay Stutsman Dep. 10:9–11:16, Feb. 28, 2011; 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. C. Stutsman Dep. 18:24-20:15; R. p. 412, line 24-p. 414, line 15. Anson subsequently provided SCE&G a

proposal that included all the material terms of the contract. In early January 2008, when SCE&G was ready to begin the construction, Anson informed the utility that it would not begin work until it had a signed contract. Pete Stutsman Dep. 34:24-35:1, July 18, 2012; 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 Proposal and delivered it to Anson by delivering a signed copy of the Anson Proposal to Clay "Whit" Stutsman, Anson's project manager. Thigpen Dep. 27:9-28:5; R. p. 313, line 9-p. 314, line 5; Anson Proposal, January 4, 2008; R. p. 708.

By signing the Anson Proposal, SCE&G accepted its terms without modification. C. Stutsman Dep. 11:5-10. R. p. 405, lines 5-10. Thigpen, on behalf of SCE&G, testified that he signed the proposal "so that Anson could go to work." Thigpen Dep. 27:21-25, 54:3-56:15; R. p. 313, lines 21-25, p. 340, line 3-p. 342, line 15. Anson considered its approved, unmodified proposal as the "contract document" and started work on January 7, 2008. P. Stutsman Dep. 26:11-23, 32:23–33:19; R. p. 475, lines 11-23, p. 481, line 23-p. 482, line 19.

Also on January 4, 2008, SCE&G emailed a Purchase Order and General Terms and Conditions to Anson. However, when Mr. Thigpen met Clay Stutsman on site to mark out the location of the vault, the only documents he had – and gave to Clay – were the signed Anson Proposal and permits from the City of Charleston. Thigpen Dep. 53:19–54:20; 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." Id., p.53:17-18; R. p. 339, lines 17-18. SCE&G did not require Anson to deliver a signed purchase order prior

to Anson beginning work and Anson never signed that document. Donnie Graham Dep. 21:2-8, 34:2-9, May 17, 2012; R. p. 639, lines 2-8, p. 652, lines 2-9.

Anson intentionally did not sign the later-provided purchase order from SCE&G. P. Stutsman Dep. 46:11-15; R. p. 495, lines 11-15. The Purchase Order played *no* part in Anson's starting work on the job. As Pete Stutsman, the president of Anson, testified: "On this occasion we used our form because there was no paper that we had and they were ready to go. So we gave them an estimate and we moved forward based on their executing the estimate." P. Stutsman Dep. 34:17-22; R. p. 483, lines 17-22.

The procurement process used in this transaction did not follow SCE&G's normal process. Here, Anson's Proposal was used by both parties in lieu of a Request for Proposal ("RFP"), which was never issued in this case. Graham Dep. 30:22-25, 44:19-45:4; R. p. 648, lines 22-25, p. 662, line 19-p. 663, line 4. SCE&G's Terms and Conditions were not sent to Anson prior to Anson submitting its Proposal; these terms and conditions are stated on the purchase order that normally accompanies a RFP. Id., 29:23-30:25; R. p. 647, line 23-p. 648, line 25. Randy Morris Dep. 20:8-21:20, May 17, 2012; R. p. 688, line 8-p. 689, line 20. Neither SCE&G nor Anson ever signed the Purchase Order as required on its face. When SCE&G signed Anson's Proposal on Friday, January 4, 2008, the only conditions, scope of work, and terms available to Anson were those provided in Anson's approved Proposal.

Moreover, there are significant differences between the Anson Proposal and the SCE&G Terms and Conditions. For example, Anson did not acquire the permits required for the construction, as required by ¶1:03 of the SCE&G Terms and Conditions—these were obtained by SCE&G. Anson did not provide the insurance certificate required by ¶

1:25 and Attachment III; nor did it name "SCANA Corporation and its subsidiaries" as additional insureds under its insurance policies, as required by Attachment III. The actions of Anson and SCE&G were, therefore, in direct conflict with the SCE&G Terms and Conditions.

After the work was stopped and it was clear that Anson would not return to the project, Anson submitted its invoices to SCE&G in which it referenced the purchase order number supplied by SCE&G. Pete Stutsman testified that he considered the Purchase Order only "a vehicle...which we used to get paid." P. Stutsman Dep. 44:14-19; R. p. 493, lines 14-19. SCE&G's Manager of Strategic Sourcing, Donnie Graham, testified, *de facto*, that the primary purpose of SCE&G's purchase orders was to ensure payment to vendors. His testimony was as follows:

> 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.

Graham Dep. 18:2-6, 14–19:7; R. p. 636, line 2-p. 637, line 7.

Anson began work on the Dock Street project on the morning of Monday, January 7, 2008. C. Stutsman Dep. 23:3-4, 38:20–39:2; R. p. 417, lines 3-4, p. 432, line 20-p. 433, line 2. At no time on Monday or Tuesday did Anson's job foreman, James Smith, report any problems with the installation of the vault. C. Stutsman Dep. 18:11-18, 37:8-11; R. p. 412, lines 11-18, p. 431, lines 8-11. By the end of Tuesday, the trench box was in place in the ground and Anson was not aware of any complaints. Id., 42:12–43:13; R.

p. 436, line 12-p. 437, line 13. On Wednesday, January 9, the City issued a stop-work order, alleging that the vault had been placed in the wrong location. Id., 43:14-17; R. p. 437, lines 14-17.

Subsequently, the French Huguenot Church filed a lawsuit against both Anson and SCE&G, alleging that damage had been done to their building during the course of the work. Both Anson and SCE&G settled with the Church. SCE&G then brought the present indemnity claim against Anson in which one of the key questions is the terms of the contract between Anson and SCE&G.

SCE&G moved for partial summary judgment as to what documents comprised the contract. The Trial Court granted SCE&G's motion for partial summary judgment, holding that Anson's signed Proposal and SCE&G's Purchase Order and General Terms and Conditions comprised the parties' contract. A copy of the Court's filed Order is attached. Order Granting Mot. Partial Sum. J.; R. pp. 3-9. Anson has appealed this Order. This brief supports that appeal.

Arguments

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT SCE&G WHEN THERE WAS FAR MORE THAN A SCINTILLA OF EVIDENCE THAT ANSON CONSTRUCTION DID NOT ACCEPT, BUT REJECTED, THE TERMS AND CONDITIONS THAT SCE&G INJECTED INTO THE PROCESS AFTER A COMPLETE CONTRACT HAD ALREADY BEEN FORMED BETWEEN THE TWO PARTIES.

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.

The lower court erred in granting summary judgment as there was a material issue of fact as to the terms of the contract.

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

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

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

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

In the motion before the Court, the issue was whether the contract between Anson and SCE&G included the General Terms and Conditions that were part of the unsigned

Purchase Order. Anson denies that it accepted these terms and proffered significant documentary and testimonial evidence[1] demonstrating that it rejected these terms.

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

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

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

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

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

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

[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.

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.

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 Proposal offered by Anson. The disputed issue is whether that contract was modified or amended by SCE&G's proposed Terms and Conditions. As is discussed in greater detail below, the Anson Proposal was signed and delivered by SCE&G without modification. On this basis, Anson began work. Anson rejected the SCE&G Terms and Conditions because they included, *inter alia*, indemnity, risk transfer, and insurance provisions that were unacceptable to Anson. SCE&G did not require acceptance of its Terms and Conditions before allowing Anson to go to work, thus waiving any right to insist on these terms.

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

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

The Trial Court's seven-page order, filed July 23, 2013, cites no words or action by which Anson accepted SCE&G's Terms and Conditions. Rather, the Court skips from references to the offer of the Terms and Conditions by SCE&G, Order Granting Mot. Partial Sum. J. ¶¶ 11-14, July 23, 2013, to the conclusion that Anson "agreed" to its terms. Order Granting Mot. Partial Sum. J. ¶¶ 15-16; R. pp. 4-5. The Court does not cite any evidence from the Record to support that conclusion, and there is no such evidence

1. Performance of the work defined in the signed Proposal is not evidence of the acceptance of terms of a different contract form.

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."

Order Granting Mot. Partial Sum. J. ¶ 17; R. p. 5. The Court appears to assume that Anson's work on the job site is conclusive proof of Anson's intent to accept SCE&G's Terms and Conditions. Order Granting Mot. Partial Sum. J. ¶ 18; R. p. 5. This is a logical and legal fallacy and ignores undisputed facts.

The Anson Proposal agreed to by both parties anticipates that Anson will undertake the work. The SCE&G's Terms and Conditions, which Anson denies is part of the contract, also anticipates that Anson will undertake the work. Anson did undertake the work. It is on this undertaking of work that the Court appears to rely in order to find that Anson agreed that SCE&G's Terms and Conditions were part of the contract.[2] However, in this case, it is completely reasonable to infer (as was precisely the case) that Anson was acting in performance of the Anson Proposal (the executed contract) as those actions were provided for by Anson's Proposal and the Anson Proposal had been specifically agreed-to and executed by SCE&G. Thigpen Dep. 24:3–28:5, 54:12-55:23; 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 Proposal indicating SCE&G's approval, testified that he "signed [Anson's Proposal] so that Anson could go to work." Thigpen Dep. 27:24-25; 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 Proposal]. Id., 28:3-4; 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

[2] The conclusion that Anson accepted SCE&G's Terms and Conditions by its very act of performance is unwarranted in light of the fact that these Terms and Conditions are inconsistent with the only signed agreement.

Anson. The only documents he had when he reached a meeting of the minds with Anson's representative were Anson's Proposal and the permit. Thigpen Dep. 53:13-54:2; R. p. 339, line 13-p. 340, line 2. Pete Stutsman testified similarly on behalf of Anson. He testified that Anson offered the Anson Proposal to SCE&G "and they signed it and accepted it, and we went to work based on that document." P. Stutsman Dep. 34:24-35:1; R. p. 483, line 24-p. 484, line 1. Anson's performance was, therefore, dependent solely on the Anson Proposal, 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 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 agreement it entered into with SCE&G, i.e., the Anson Proposal. At the very least, because there are two inconsistent inferences regarding the intention of the parties to be drawn from the act of performance, the matter should have been submitted to the jury, and the Court erred in granting SCE&G's Motion for Summary Judgment.

2. 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 Court appears 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. Order Granting Mot. Partial Sum. J. ¶ 20; 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.

Morris Dep. 28:1-7; 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.

Graham Dep. 19:1-10; 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

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

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

P. Stutsman Dep. 44:14-19, 22-24; R. p. 493, lines 14-19, 22-24.

Despite this testimony in the depositions presented, the 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. His testimony was:

Q: Okay. Do you, how many jobs has SCE&G and Anson worked together on over the years?

A: I don't know the specific number. It's been several.

Q: Do they always follow a particular process, meaning. RFP?

A: No. Sometimes it's – no. No. It does not. Sometimes we have an opportunity to go through an RFP process. And other times it has been sole sourced for whatever reasons was requested at the time.

Q: Have you been involved in a lot of those?

A: I've been involved in several.

Q: Okay. And the process has been different every time for you?

A: Pretty much. You know, sometimes when they were, when we have time, we're able to, we're allowed time to bid some of the work out. And sometimes depending on the situation if it was they needed something right now and they indicated to me they didn't have time to go through a bid process, then it might not go through an RFP process.

Q: It would just differentiate from what the manual tells you to do, you would make an exception basically?

A: Then we go into a sole source situation.

Morris Dep. 25:8–26:5; R. p. 693, line 8-p. 694, line 5.

Q: Okay. Is a purchase order similar to this always issued for work?

A: No.

Q: Has it always been issued to Anson for work?

A: Not that I'm aware of. And the reason I say that is unless they come and they're requesting a purchase order, I'm not familiar with what goes on.

Id., 27:6-12; R. p. 695, lines 6-12.

Q: Okay. Let's look back at the proposal which is Exhibit Four Anson proposal. You say SCE&G and Anson have done a significant amount of work together over the years which you can't quantify?

A: Huh-uh (negative response).

Q: Have you ever seen an Anson proposal signed by an SCE&G employee before?

A: No.

Id., 29:6-14; R. p. 697, lines 6-14.

Q: Why weren't bids solicited for this particular project, the Dock Street Theater job project?

A: From what I recall they just didn't feel like they had sufficient time. They needed to go ahead and get the work started like now. I don't remember the details at that point in time on why. I know it involved something with the city. I do recall that. But they just felt that they had a certain time frame that they could get in there and get the work started and get it completed by.

Q: And you talked about if there was a sole source situation. And you said this was a sole source situation.

A: Yes.

Id., 31:7-20; R. p. 699, lines 7-20.

The upshot of Mr. Morris' testimony was that SCE&G's process for securing the services of Anson Construction did *not* follow a consistent pattern, and that the project at issue – a sole source procurement based on the exigency of time – 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. He testified as follows:

Q: Mr. Stutsman, you were asked earlier ... about the contracting process between SEC&G and Anson [during the] ... many years that you-all have worked together. Has the contract – has the contracting process been done the exact same way every time?

A: No.

Q: Is it in fact different from contract to contract, depending on the terms or the work that's to be done?

A: Job to job, yes, it is different.

Q: To your knowledge, as you sit here today, prior to 2008, has SCE&G – have you ever signed or has Anson ever signed a purchase order that SCE&G sent them?

A: No.

Q: Has Anson ever signed [the purchase order in issue here]?

A: No.

Q: If you can look at Exhibit 2, … is that your quotation or proposal for the Church Street job?

A: Yes.

Q: Is that Mr. Jesse Thigpen's signature at the bottom of the page?

A: Yes.

Q: Can you recall an instance where anyone from SCE&G, prior to this contract being executed, ever signed an Anson proposal?

A: No.

Q: Is that abnormal for SCE&G to sign an Anson proposal?

A: Yes.

P. Stutsman Dep. 159:18, 22–160:9, 22-23, 25-161:15; 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, Pete 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. P. Stutsman Dep. 29:22-30:4; R. p. 478, line 22-p. 479, line 4. 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." Id.; 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.

C. 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. P. Stutsman Dep. 161:9-12; 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." Id., 26:17-21; R. p. 475, lines 17-21. Given the situation, Anson considered their SCE&G-executed proposal as the contract document and went to work on that basis. Id., 26:11-17, 32:3-33:18; 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." Id., 32:23-33:1; R. p. 481, line 23-p. 482, line 1.

When Anson presented its Proposal and SCE&G executed it, Anson did not have a purchase order from SCE&G. Id. at 33; R. p. 481, p. 33. On the same date that SCE&G signed Anson's Proposal, January 4, 2008, it e-mailed Anson a purchase order. Id., 44:25-45:15; 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. Id. at 46; 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." Id., 46:11-15; 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.

P. Stutsman Dep. 64:14-18; R. p. 513, lines 14-18.

Importantly, there was only one document executed between SCE&G and Anson for the work on the Dock Street Theater project. To the extent that SCE&G asserts that the Purchase Order's Terms and Conditions are part of the contract, there clearly was no meeting of the minds; thus a fundamental prerequisite of South Carolina law regarding contracts was clearly not met. As this Court has held, citing our Supreme Court, "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." H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co., 405 S.C. 469, 748 S.E.2d 72 (Ct. App. 2013) (italics in original) (quoting Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989)).

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 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.

II. THE TRIAL 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 Terms and Conditions were "agreed" to by Anson, the Court then purported to "construe" the documents to give all of the terms their "full meaning and effect." In doing so, the 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 Court concluded that SCE&G's signing its acceptance of Anson's Proposal 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 Proposal, which stated that, "[t]his proposal is subject to execution of a non-modified AIA form or subcontractor approved equal." Anson Proposal; R. p. 708.

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

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, 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)). The court in Fletcher 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.

Moreover, 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 also 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 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 proposal 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 Proposal 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 Proposal, 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, another 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 another 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 Court erred in applying Paragraph 2 to permit the merger of the two forms.

B. The Terms and Conditions do not satisfy the requirements of Paragraph 2 of the Proposal.

The Court erroneously held that the SCE&G Purchase Order and the SCE&G Terms and Conditions, as an undisputable fact, were the document contemplated by the condition precedent. Order Granting Mot. Partial Sum. J ¶ 56; 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 Proposal.

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

[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.

Nevertheless, the 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," Order Granting Mot. Partial Sum. J. ¶ 54; 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…" Order Granting Mot. Partial Sum. J. ¶ 56; R. p. 8. The Order thereby ignores the terms of the Quotation that specifically requires a "non-modified AIA form" or "subcontractor approved equal." Anson Proposal, ¶ 2; R. p. 708.

Peter F. Stutsman, president of Anson, testified about Paragraph 2 as follows:

Q: What does bullet point two mean to Anson?

A: For Anson, that means that either this document or a subcontract – that we were the subcontractor to SCE&G. That absent this document being executed, that we would look for a nonmodified AIA in totality or a subcontractor approved equal, which in this particular occasion we were acting as the subcontractor. This became the subcontractor or equal for us.

P. Stutsman Dep. 41:14-24; R. p. 490, lines 14-24.

Q: Was there ever a nonmodified AIA form done for the church work?

A: No.

Q: So then there's the word or, and so it means that we could have a different alternative. So in that case, it would read this proposal is subject to execution of a subcontractor approved equal.

A: Equal to the nonmodified AIA.

Q: And is it Anson's position that this document, the quotation, is the subcontractor approved equal?

A: For our purposes, yes.

Id., 42:24-43:10; R. p. 491, line 24-p. 492, line 10.

There are, therefore, diametrically different interpretations of the terms of Anson's Proposal. That fits our State's legal definition of "ambiguous." 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 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 Court erred in *de facto* holding that Anson's Proposal was unambiguous. The Court gave a totally different interpretation to the terms of the contract and the situation regarding supplementary documents than did the drafter of the Proposal. See P. Stutsman Dep. 59:5–60:3; 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 Proposal and the testimony of its author.

If the terms of Anson's Proposal – 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 empanelled. Transcript of Trial 58-60, July 22-23, 2012; 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 Court erred in granting summary judgment.

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

The 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 Proposal and the SCE&G 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 297-298, 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 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, while Anson and SCE&G only executed one signed contract. 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 Proposal and SCE&G's Purchase Order and accompanying General Terms and Conditions are entirely different documents and have directly conflicting terms.

These are not distinctions without a difference. 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 Court erred in applying the holding in Wilbur to this case. It was for the jury to determine which documents formed the contract.

CONCLUSION

The Court's grant of partial summary judgment to SCE&G should be reversed. There is no evidence in the record that Anson – by work, document, or deed – accepted SCE&G's Terms and Conditions. To the contrary, all of the evidence in the record is that Anson specifically rejected the Terms and Conditions proposed by SCE&G. Anson went

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

to work solely based on its own Proposal, accepted without qualification by SCE&G via the signature of Mr. Thigpen, who sought to have Anson to begin work expeditiously.

The award of partial summary judgment should be reversed because the issue of the parties' intention should be decided by a jury.

Respectfully submitted,

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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 this Final Brief complies with Rule 11(b), SCACR.

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