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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM FIFTH JUDICIAL CIRCUIT, RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Civil Action No. 2022-CP-40-02656

Appellate Case No. 2023-000667

Intellectual Capitol, Inc., Barry Newkirk, And Neil Richards,

Appellants,

vs.

Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and South Carolina Workers' Compensation Commission,

Respondents.

Civil Action No. 2022-CP-40-02536
Appellate Case No. 2023-000668
JMI Sports and JMIS College, LLC,

Appellants,

vs.

Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and Clemson University,

Respondents.

APPELLANTS' RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Appellants Intellectual Capitol, Inc., Barry Newkirk, and Neil Richards (collectively "ICAP"), and JMI Sports and JMIS College, LLC (collectively "JMIS"), by and through their undersigned counsel, hereby respond in opposition to Respondents South Carolina Workers' Compensation Commission ("WCC"), Clemson University ("Clemson") and Chief Procurement Officer, South Carolina State Fiscal Accountability Authority and Division of Procurement Services (collectively the "State" or "CPO") Motion to Dismiss Appeal. Appellants would show the Court as follows:

Background

These cases arise under the South Carolina Uniform Declaratory Judgment Act, pursuant to which Appellants seek a simple declaration that S.C. Code Ann. § 11-35-4230 (the "Statute") is facially unconstitutional and violates the separation of powers doctrine to the extent that it bestows judicial power on the State's Chief Procurement Officer ("CPO") to decide claims *by* the State, rather than *against* the State, in the context of a government contract controversy. This important distinction is the crux of Appellants' case because the South Carolina Constitution in S.C. Const. art. X, § 10 and S.C. Const. art. XVII, § 2 explicitly distinguishes between "claims *against* the State" and all other claims, including "claims by the State."

The singular issue before the Court involves only Appellants' request for a declaration that the Statute is unconstitutional in part because it purports to apply to claims ***by*** the State, as well as to claims ***against*** the State. Contrary to Respondents' assertion, Appellants make a constitutional challenge to the Statute in all such cases. This is because there can be no fact pattern in which claims ***by*** the State may heard and decided by an executive branch officer without violating the Separation of Powers Clause of the South Carolina Constitution. The portion of the law that intrudes on exclusive judicial branch power (for claims by the State, rather than against the State),

is facially invalid. Only claims ***against*** the State may be so established and adjudicated in any other manner by directive of the General Assembly. *S.C. Const. art. X, § 10; art. XVII, § 2; art. I, § 8; art. V, § 11.* This is the focus of the merits of this appeal.

I. Only a Court can Rule on A Declaratory Judgment Act Case.

Respondents move to dismiss Appellants' appeal of the lower court's decision in Petitions brought solely under the Uniform Declaratory Judgments Act because Appellants have not "exhausted their administrative remedies" before the CPO and the Procurement Review Panel ("Panel"). The Uniform Declaratory Judgments Act, in S.C. Code Ann. § 15-53-20, provides that "***Courts of record*** within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed" (emphasis added). The CPO and the Panel are not "Courts of record." They offer no remedy to be exhausted.

Even the unconstitutional statute at issue (S.C. Code Ann. § 11-35-4230) does not purport to confer on the CPO or the Panel the power or authority to decide cases under the Uniform Declaratory Judgment Act, or to rule on the constitutionality of laws. As this Court astutely recognized in *Video Gaming Consultants, Inc., v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000), as quoted with approval in *Ward v State,* 343 S.C. 14, 538 S.E. 2d 245 (2000):

> Requiring a party to raise an issue which cannot be ruled upon by an ALJ makes little sense and certainly is not effective or appropriate. Here, declaratory relief should not be refused as there is no other effective appropriate remedy under the circumstances. The agency and the ALJ cannot rule on the constitutionality issue. In fact, requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine.

Ward, 343 S.C. at 19, 538 S.E. 2d at 247-8 (emphasis added). The *Ward* Court further explained: "as a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a

court may decide the case without waiting for an administrative ruling. The basis for our decision was that Administrative Law Judges (ALJs) come under the executive branch and must follow the laws as written. ***Allowing ALJs to rule on the constitutionality of a statute would violate the separation of powers doctrine***.[1]" *Id.* at 18, 247 (emphasis added).

The lower court's original Order of Dismissal unconstitutionally demands that Appellants first apply to the CPO and the Panel for resolution of the Uniform Declaratory Judgment Act Petition – an action over which all parties agree that the CPO and the Panel lack power and authority to decide. Indeed, like the Panel[2] the CPO himself expressly conceded such lack of authority, in his Motion to Dismiss:: "...an administrative body generally cannot rule on the constitutionality of statutes…." (Respondent-Defendant Chief Procurement Officer's Motion to Dismiss at paragraph 2). As the Court in *Ward* correctly recognized, requiring an executive branch official or body to decide the constitutionality of a statute–as the lower court has done in the instant case–violates the Separation of Powers Clause.

Because the CPO and Panel have no power to hear and rule on a Petition under the Uniform Declaratory Judgment Act and doing so would violate the Separation of Powers Clause, there is

[1] In the *Unisys Corporation v. Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001) case cited in the lower court's dismissal order, Unisys Corporation had not only applied for declaratory relief, but it had also initiated a breach of contract claim against the State in the circuit court in the same action – despite the law requiring them to bring such claims against the State before the CPO first. This is the reason the circuit court in *Unisys* ruled as it did, and that it considered at all (but ultimately rejected) the exhaustion of remedies doctrine in that case. It is important to note that Appellants here have asserted no such breach of contract or other claim for recovery against the State before the circuit court – but instead, only the declaratory judgment case.

[2] "Prior to the hearing, Smith was notified that the Panel would not hear questions of constitutionality but would presume that all duly enacted laws of the General Assembly are constitutional." *IN RE: PROTEST OF SMITH SETZER & SONS, INC.,* 1990 SC CPO LEXIS 2.

simply no "administrative remedy" to exhaust in this instance, and Respondents' Motion to Dismiss must be denied.

II. Respondents' Motion Relies on a Misreading of Inapplicable Precedent From an Inapplicable Circumstance – "Claims Against the State."

a. *Evans* Did Not Hold that an ALJ has Judicial Power to Decide a Declaratory Judgment Case, Thus There is No Administrative Remedy to Exhaust.

Respondents seek to lead this Court into error, claiming that an administrative branch officer or body may indeed decide a Declaratory Judgment Act action – citing *Evans v. State*, 344 S.C. 60, 543 S.E.2d 547 (2001). *Evans* disavows this proposition entirely, as does *Ward*. Indeed, *Evans* is clear that while an ALJ may decide an individual's *constitutional rights* have been violated in a given instance, it reaffirms the *Ward* holding that an ALJ lacks judicial power *to declare a statute or any part thereof unconstitutional*, which is the only issue in the Declaratory Judgment matter now before the Court:

> **Recognizing the separation of powers doctrine prohibits an agency and ALJ from ruling on the constitutionality of a statute,** we concluded § 12-60-3390 was inapplicable **"where the sole issue [was] whether a statute or other legislative action is constitutional."** 343 S.C. at 19, 538 S.E.2d at 248. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) **(if only issue is a constitutional challenge to a statute, party should seek declaratory judgment from circuit court rather than ALJ)**. The Court concluded the federal retirees were not required to exhaust their administrative procedures under the Revenue Procedures Act because the issue under consideration was the facial constitutionality of Act 189.

Evans, 344 S.C. at 66, 543 S.E. 2d at 550 (emphasis added). Here, unlike in *Evans*, the only issue presented in Appellants' Declaratory Judgment Petition is the facial unconstitutionality of S.C. Code Ann. § 11-35-4230. It is well-settled that such request must be heard exclusively by a "court of record." S.C. Code Ann. § 15-53-20. Any other outcome would be against the Statute, the weight of authority in South Carolina, and in violation of the Separation of Powers Clause.

b. *Evans* and *Unisys* Involved Claims Against the State, Which the Constitution Distinguishes from Claims By the State.

A simple reading of *Evans* reveals its inapplicability to the instant case. This is because *Evans* involves claims *against* the State, not *by* the State. In that case, the issue before the Court was an injunction brought by plaintiff-retirees *against the State* for the future imposition of state income taxes on their retirement benefits and damages in the form of an income tax refund for state income taxes paid on their retirement benefits. *Evans,* 344 S.C. at 63-64, 543 S.E.2d at 549. Here, by contrast, there is no comparable claim against the State presented to the circuit court, rather than before an authorized executive branch officer.[3] For this reason, *Evans* is wholly distinguishable.

Moreover, *Evans* expressly relies on a constitutional exception to the exclusive power of the judicial branch that is inapplicable to a claim by the State, rather than against it – namely, S.C. Const. art. X, § 10 and S.C. Const. art. XVII, § 2 (each of which says the same thing) regarding "claims ***against*** the State." The *Evans* Court relies on this exception for "claims against the State" as the key provision upon which its decision there rests:

> In two provisions, the South Carolina Constitution states:
>
> *The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted*.

Evans, 344 S.C. at 64-65, 543 S.E.2d at 549 (emphasis added). Such language unequivocally applies only to claims *against* the State. There is no such language applying to the circumstance here: claims *by* the State.

[3] In fact, ICAP has asserted no claims against the State in any matter or venue. And JMIS has asserted a claim against the State only in a separate pending matter, but asserted it before the CPO, who properly has jurisdiction over that claim because S.C. Const. art. X, § 10 and S.C. Const. art. XVII, § 2 authorize the General Assembly to vest power over such "claims against the State" as it sees fit. This circumstance is in direct contrast to the *Unisys* case, wherein Unisys brought breach of contract claims against the State in the circuit court.

Similarly, *Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office*, 346 S.C. 158, 170, 551 S.E.2d 263, 270 (2001), which Respondents also cite, is readily distinguishable because it also involved claims for recovery brought *against the State* in the circuit court. In that case, Unisys Corporation had not only applied for declaratory relief, but it had also initiated a breach of contract claim *against* the State in the circuit court in the same action – despite the law requiring it to bring such claims against the State before the CPO first. This is the reason the circuit court in *Unisys* ruled as it did and considered at all (but ultimately rejected) the exhaustion of remedies doctrine. Again, Appellants here have asserted no such breach of contract or other claim for recovery *against* the State before the circuit court. Indeed, the only issue at hand is the constitutionality of S.C. Code Ann. § 11-35-4230.

There is a constitutional carve out from exclusive judicial power for cases that assert "claims against the State." That limited carve out expressly allows the legislature to determine how such claims *against* the State will be adjusted. There is no such carve out for *claims by the State*.[4]

The case at hand involves no claim against the State. As a result, no executive branch officer – indeed, no body other than a court of the judicial branch – may decide Appellants' Request for a Declaratory Judgment under the Uniform Declaratory Judgment Act. As this Court held in *Ward*, an ALJ or executive branch official may not offer any remedy at all in a Declaratory Judgment Act case seeking a ruling on the constitutionality of a law as written. Therefore, the

[4] The fact that an unconstitutional law, vesting judicial power in a branch other than the judiciary, recites that it is the "exclusive means" to resolve disputes cannot remedy the fact that the law is unconstitutional in the first place in reposing such unconstitutional jurisdiction in conflict with judicial power in the Separation of Powers Clause.

exhaustion of administrative remedies requirement cannot apply. An "exclusive remedy" cannot be "no remedy at all."[5]

In summary, because this matter seeks only a declaration under the Declaratory Judgment Act regarding the facial constitutionality of a law and does not involve a claim *against* the State, there is no "administrative remedy" to exhaust. Allowing an administrative officer to hear and decide Declaratory Judgment Act cases involving the constitutionality of laws is in clear violation of the Separation of Powers Clause. Respondents' Motion to Dismiss Appellants' Appeal must be denied in order for this Court to bring clarity and consistency to the law under our Constitution.

Respectfully Submitted,

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[5] The fact that an unconstitutional proceeding before an executive branch officer is subject to judicial review on appeal does not remedy the fact that the law is unconstitutional in the first place in reposing such unconstitutional jurisdiction in conflict with judicial power in the Separation of Powers Clause. It cannot resolve the defect that the executive branch office lacks constitutional judicial power over the matter in the first place.