RECEIVED

Jan 08 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case Nos. 2023-000667 & 2023-000668

Intellectual Capitol, Inc., Barry Newkirk and Neil Richards, Appellants,

v.

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and South Carolina Workers' Compensation Commission, Respondents.

AND

JMI Sports and JMIS College, LLC, Appellants,

v.

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and Clemson University, Respondents.

INITIAL REPLY BRIEF OF APPELLANTS TO INITIAL BRIEF OF RESPONDENTS

SCHMIDT & COPELAND, LLC
John E. Schmidt, III, S.C. Bar No. 4973
Melissa J. Copeland, S.C. Bar No. 5904
1201 Main Street, Suite 1980
Columbia, SC 29211
803-748-1342

Attorneys for Appellants

THE CARPENTER LAW FIRM, PC

James G. Carpenter, S.C. Bar No. 1136
819 East North Street
Greenville, South Carolina 29601
864-235-1269

Attorneys for Appellants JMI Sports, LLC and JMIS College, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STANDARD OF REVIEW 1

STATEMENT OF THE CASE IN REPLY 1

ARGUMENT 5

I. The Separation of Powers Clause Prohibits the Assignment of Fundamental Judicial Functions to the Executive Branch 5

A. South Carolina's Separation of Powers Clause is Clear and Unequivocal, Forbidding the Law's Treatment of Claims by the State. 5

B. S.C. Code Ann. § 11-35-4230 is Unconstitutional on its Face Because it Assigns a Core Function of the Judicial Branch to an Executive Official. 6

C. *Unisys* Is Not "on All Fours;" It Never Mentions Separation of Powers, which is the Central Issue in this Case. 8

D. Limited Appellate Judicial Review and Enforcement Does Not Cure the Separation of Powers Violation. 9

E. Federal Decisions Did Not "Shoot Down" *Carolina Glass* 11

II. The Disputes Clause Cannot Vest Jurisdiction 13

A. The Parties' Agreement Cannot Confer Subject Matter Jurisdiction. 13

B. The Disputes Clause Does Not Vest the CPO with Exclusive Jurisdiction, Instead Recognizing Three Possible Forums 14

C. Not all Appellants Were Parties to the Disputes Clause Contract. 16

D. Appellants' Action Was Timely 16

III. The Respondents' Jury Trial "Waiver" Argument Is Equally Flawed. 16

CONCLUSION 17

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

S.C. Const. art. I, § 8 ..... 5, 10
S.C. Const. art. V, § 11 ..... 2, 5, 10
S.C. Const. art. X, § 10 ..... 1, 5, 8, 10
S.C. Const. art. XVII, § 2 10

CASES

American Agricultural Chemical Co. v. Thomas, 206 S.C. 355, 34 S.E.2d 592 (1945) 13
Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989) 13
Carolina Glass Co. v. State, 87 S.C. 270, 69 S.E. 391 (1910) 9, 11, 12, 13, 17
Catawba Indian Tribe v. State, 372 S.C. 519, 642 S.E.2d 751, 753 (2007) 1
Langley v. Boyter, 284 S.C. 162, 181-82, 325 S.E.2d 550 (Ct. App. 1984) 9
Langley v. Boyter, 286 S.C. 85, 332 S.E.2d 100 (1985) 9
Murray's Lessee v. Hoboken, 59 U.S. 272, 15 L. Ed. 372 (1855) 12
Paschal v. Causey, 309 S.C. 206, 420 S.E.2d 863 (1992) 13
Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 301 S.E.2d 761 (1983) 16
Plante v. State, 315 S.C. 562, 563, 446 S.E.2d 437 (1994) 13
S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 403 S.C.640, 744 S.E.2d 521 (2013) 6
State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977) 2
State v. Grim, 341 S.C. 63, 66, 533 S.E.2d 329 (2000) 13
Stern v. Marshall, 564 U.S. 462 (2011) 10, 12
Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1988) 6
Unisys v. South Carolina Budget and Control Board, 346 S.C. 158, 551 S.E.2d 263 (2001) .. 8, 17
United States v. Unified Indus., 929 F. Supp. 947 (E.D. Va. 1996) 10
White v. Commonwealth, 214 Va. 559, 203 S.E.2d 443 (1974) 16
Zeller v. Cumberland Truck Sales, 272 S.C. 558, 253 S.E.2d 111 (1979) 15

STATUTES

Commodity Exchange Act at 7 U.S.C. § 18 9
S.C. Code Ann. § 11-35-4230 ..... 2, 6, 7, 8, 13, 17
S.C. Code Ann. § 11-35-4410 ..... 1, 7
S.C. Code Ann. § 11-35-4425 7
S.C. Code Ann. § 15-48-10 16
The Contract Disputes Act at 41 U.S.C. 7103 ..... 9, 11

STANDARD OF REVIEW

The case presents a question of law, and the Supreme Court reviews all such questions *de novo. Catawba Indian Tribe v. State,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). The Respondents' "Standard of Review" argues statutory interpretation rules as a standard of review. This case does not raise any issue of administrative review or statutory construction.

STATEMENT OF THE CASE IN REPLY

The statute in question grants the Chief Procurement Officer ("CPO") exclusive authority to hear all claims related to a government contract, irrespective of who asserts the claims. The Procurement Review Panel ("Panel"), another administrative body, reviews claims *de novo* under S.C. Code Ann. § 11-35-4410. Appeals are to the Court of Appeals. Appellants challenge the constitutionality of this statute insofar as it relates to claims **by** the State and request declaratory judgment[1].

Clemson v. JMIS

Appellants JMI Sports and JMIS College, LLC (collectively "Appellants" or "JMIS") provide multimedia sports marketing services to private industry and government clients. In July 2016, Clemson University ("Clemson") awarded a contract to JMIS to perform multimedia marketing services. Clemson is a state agency.

When a dispute arose, Clemson filed a Request for Resolution against JMIS with the CPO[2] alleging breach of contract and fraud and seeking more than 15 million dollars in damages. The

[1] Appellants include not only the parties to the government contracts in question, but also employees of a contracting party who are not parties to a contract. This is relevant to Respondents' waiver and consent arguments.

[2] JMIS separately filed claims *against* Clemson with the CPO in accordance with the Separation of Powers exception for a limited class of claims – "against the State" as permitted in S.C. Const. art. X, § 10.

CPO is employed by the South Carolina Fiscal Accountability Authority ("SFAA"), Division of Procurement Services and is a member of the Executive Branch of State government. *See State ex rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E.2d 406 (1977).

The issue is whether Clemson's claims can be properly heard by the CPO, an employee of the Executive Department. Appellants contend the South Carolina Constitution guarantees them a right to defend themselves in a circuit court and a trial by jury.

Clemson contends that S.C. Code Ann. § 11-35-4230 supplants Appellants' constitutional rights and that the CPO has exclusive jurisdiction to hear all common law disputes involving a government contract. Clemson further contends that Appellants forfeited their constitutional rights by entering into an agreement with a "Disputes" clause.

However, South Carolina's Constitution requires that Clemson's claim for millions of dollars against private party must be heard and decided in a judicial forum, with a judge and a right to a jury trial. The CPO is not a judge, and the administrative process is not a court. The South Carolina Constitution, article V, § 11, establishes the Judicial Branch and the exclusive original jurisdiction of its courts. The Separation of Powers Clause prohibits an administrative official from exercising judicial power or authority over common law claims by the State against a private party. Moreover, the Disputes clause does not read as Respondents assert as discussed *infra at 14-16*. Further, not all Appellants to this consolidated appeal are parties to such a contract.

Appellants challenge the legislature's authority to take away their constitutional rights. Just as a statute cannot modify the Constitution, a contractual agreement cannot modify the Constitution. Appellants request a declaratory judgment that S.C. Code Ann. § 11-35-4230 is unconstitutional insofar as it assigns original jurisdiction to an Executive Branch official to hear common law contract claims by the state against private parties.

Worker's Compensation Commission v. Intellectual Capital, Inc.
(WCC v. ICAP)

Appellant Intellectual Capital, Inc. ("ICAP") provides contractual services to private industry and government customers. In 2018, the South Carolina Worker's Compensation Commission ("WCC") awarded a contract to ICAP to perform computer system services. In March 2020, WCC filed claims with the CPO against ICAP and ICAP employees Barry Newkirk and Neil Richards, who were not parties to the contract. They are also Appellants. WCC filed an Amended Request for Resolution in December 2020. WCC alleges that ICAP and/or its agents breached the contract and committed fraud. WCC requests millions of dollars in damages. ICAP, Newkirk, and Richards asserted no counterclaims.

In January 2021, ICAP, Newkirk, and Richards moved to dismiss the claims because the Separation of Powers Clause precludes the CPO from hearing claims by the state against private parties to recover money and other judicial remedies.[3] There is no constitutional mechanism by which an Executive Branch agency can adjudicate such claims in original jurisdiction and make such an award.

ICAP, Newkirk, and Richards also filed suit in the Circuit Court for injunctive relief and declaratory judgment that the statute requiring WCC's claims to be decided by the CPO and by the Panel violates their Constitutional rights. Respondents' waiver and consent arguments under the Disputes clause have no effect on the individual Appellants, who were not parties to a state

[3] February 2021, WCC filed its Second Amended Request for Contract Resolution with the CPO. In March 2021, ICAP moved to dismiss the claims in the Second Amended Request for Resolution, again because the Separation of Powers Clause precludes the CPO from hearing such claims. In April 2022 ICAP also moved to dismiss the claims of WCC before the CPO because WCC had also destroyed essential evidence.

contract. If ICAP and its employees are required to have their common law rights determined by the CPO, a member of the Executive Branch, they are denied their constitutional rights of a judicial forum, a judicial officer, and a trial by jury.

ARGUMENT

I. The Separation of Powers Clause Prohibits the Assignment of Fundamental Judicial Functions to the Executive Branch.

A. South Carolina's Separation of Powers Clause is Clear and Unequivocal, Forbidding the Law's Treatment of Claims by the State.

Art. V, § 11 of the South Carolina Constitution assigns original and exclusive jurisdiction over civil cases to the courts – the Judicial Branch. It mandates that the three branches of government "shall be forever separate and distinct from each other" and that "no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8. These commands are clear and unequivocal. Art. X, § 10 of the Constitution also creates a limited exception only for claims *against* the State, which is not at issue here.

Thus, our Constitution recognizes the following key precepts:

- the Separation of Powers Clause prevents the legislature or executive from adjudicating any common law claims in the first instance;

- the Constitution Art; X § 10 allows a limited exception only for claims *against the State*, not claims *by the State*;

- there is no exception for particularized areas of law or expediency – ("complex" cases needing "experts"); and

- a court is the entity most expert in handling cases of breach of contract, tort, and equity.

These facts alone dictate an outcome in favor of Appellants.[4]

[4] The United States Constitution lacks the same express clauses at issue here. At the federal level, separation of powers is a mere doctrine. Therefore, federal decisions are not analogous or binding. Further, as we discuss *infra* at note 8 and pp. 9-13, the federal contract scheme is entirely different,

B. S.C. Code Ann. § 11-35-4230 is Unconstitutional on its Face Because it Assigns a Core Function of the Judicial Branch to an Executive Official.

Respondents cite to decisions involving statutory interpretation, but the statute in question requires no such analysis. Here, all parties agree that S.C. Code Ann. § 11-35-4230 vests the CPO with the exclusive original jurisdiction to hear and decide common law claims asserted by the State against contractors. The dispositive issue is whether that grant of power violates the Separation of Powers Clause of the South Carolina Constitution.

Many separation of powers cases are nuanced and involve questions of attenuated and overlapping functions between branches. For example, in *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1988) and *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank,* 403 S.C.640, 649, 744 S.E.2d 521, 525 (2013), this Court considered whether a "creature of legislative enactment" that drew membership from different branches of government is constitutional under a separation of powers challenge.

But this is not a close or complex case involving overlapping power. Instead, this is a case where the legislature has assigned original jurisdiction over the most traditional common law claims that courts have handled for centuries - in tort, contract and equity - to the Executive Branch for decision. This represents a direct and complete intrusion into the core function of the Judicial Branch in violation of the Separation of Powers Clause of the South Carolina Constitution, which expressly mandates that the three branches shall be "forever separate."

---

and allows a contractor in every instance the right to choose a Court of the Judicial Branch to hear and decide claims cases *de novo*.

Moreover, there is no exception in our state's Constitution for expediency or "particularized" areas of law, and there is no forum more capable to adjudicate breach of contract, tort, and equity cases than the Courts, which have done so for hundreds of years. In contrast, the CPO is a non-judicial position occupied by a non-lawyer.[5]

Respondents also erroneously assert that contract controversy claims under the Consolidated Procurement Code ("Code") are "complex" and "highly regulated." But such claims are nothing more than ordinary common law breach of contract claims. The Code does not change the common law on how breach of contract cases are decided; rather it largely focuses on source selection and contract formation. Only three brief provisions within the Code address a breach of contract claim, and they are the ones at issue here: the jurisdiction of the CPO (S.C. Code Ann. § 11-35-4230), and after that, the Panel on appeal (S.C. Code Ann. § 11-35-4410), and the law allowing an unappealed decision of the CPO or Panel to be registered in the Courts (S.C. Code Ann. § 11-35-4425). The law at issue here is the trigger for all three.

The judiciary alone was assigned to decide civil cases in original jurisdiction - tort cases, breach of contract cases, and equitable cases. The Constitution ensures that no legislative or executive branch officials share that duty. The Separation of Powers Clause forbids an executive branch officer from wresting these common law claims from the Judicial Branch. The framers of our Constitution were explicit in making a singular exception for "claims against the State" in article X, § 10. The framers could have easily said "claims *involving* the State." But they did not.

[5] A LEXIS search from February of 1989 to the present reveals approximately twenty-three contract dispute matters asserted "by the state" before the CPO, with four of those merely reciting settlements reached. This amounts to fewer than one case per year, which does not lend itself to the development of CPO expertise superior to that of the Courts.

C. *Unisys* Is Not "on All Fours;" It Never Mentions Separation of Powers, which is the Central Issue in this Case.

Respondents assert that *Unisys v. South Carolina Budget and Control Board,* 346 S.C. 158, 551 S.E.2d 263 (2001) is "on all fours" with this case. It is **not**. The dispositive issue presented in this case is whether S.C. Code Ann. § 11-35-4230 violates South Carolina's Separation of Powers Clause by legislatively conferring jurisdiction over claims by the State to the CPO—an executive official—when the Constitution assigns original jurisdiction over such claims to the Courts. The *Unisys* Court did not once mention the words "separation of powers" in its lengthy decision, let alone analyze whether the Separation of Powers Clause precludes the State from asserting common law claims against a contractor before an Executive Branch official.

Furthermore, unlike this case, *Unisys* arose through a civil action for breach of contract filed by a contractor *against the State* in Circuit Court. The Court's statement in *Unisys* that "no constitutional provision" prohibits the legislature from assigning claims *by the State* to a non-court is erroneous *dicta*. The Separation of Powers Clause forbids such assignment.

Respondents' Brief states, *"**Unisys had argued that Article X, § 10** of the South Carolina Constitution – providing that '[t]he General Assembly may direct, by law, in what manner claims against the State may be established and adjusted' – **limited the General Assembly's power to vest** jurisdiction only to matters against the State."* Id. at 9 (emphasis added). That sentence reveals how the *Unisys* Court was misdirected. Article X, § 10 does not limit the General Assembly's power—the Separation of Powers Clause does—but it was never raised, cited, quoted, briefed, argued, analyzed, or mentioned anywhere in the *Unisys* decision. Article X, § 10 is the reason that the Separation of Powers Clause does not invalidate the law in question as to claims ***against*** the State as well.

Respondents also erroneously argue that *Unisys* decided a constitutional issue (the Separation of Powers Clause) by *implication,* but this Court does not decide constitutional issues by implication. Chief Judge Alex Sanders wrote the following, oft-quoted observation: "More simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked. The question here before us has never been answered because it has never been asked." *Langley v. Boyter*, 284 S.C. 162, 181-82, 325 S.E.2d 550, 561 (Ct. App. 1984) (*opinion quashed* by *Langley v. Boyter*, 286 S.C. 85, 332 S.E.2d 100 (1985).[6]

Unlike *Unisys*, in *Carolina Glass Co. v. State*, the issue **was presented** to the Court, and that Court **decided** the precise Separation of Powers issue presented here. *Carolina Glass Co. v. State,* 87 S.C. 270, 69 S.E. 391 (1910). *Carolina Glass* is still good law. It is the one case "on all fours" with the instant case. Unisys sued the State under the common law in the Circuit Court. Appellants in the case at bar did not. The Court's analysis in *Unisys* relies entirely on that distinctive fact.

D. Limited Appellate Judicial Review and Enforcement Does Not Cure the Separation of Powers Violation.

Respondents cite federal cases involving processes that allow litigants to choose a Court to resolve claims *de novo*. The federal systems are vastly different from the South Carolina system in many ways. The Contract Disputes Act at 41 U.S.C. 7103, and the Commodity Exchange Act at 7 U.S.C. § 18 both allow the affected private litigants to elect a Court of the Judicial Branch to handle asserted claims de novo, while the state law at issue here does not. The Contract Disputes

[6] Even though the Supreme Court quashed the opinion in *Langley*, a Westlaw search brought up 27 citations to that quotation in South Carolina appellate jurisprudence, including ten uses by this Court.

Act also does not provide for an agency to decide fraud claims or equitable remedies. Government fraud claims are brought by the government in the federal District Courts. *See United States v. Unified Indus.*, 929 F. Supp. 947 (E.D. Va. 1996).

Under that distinct federal structure, with a right to *de novo* judicial review and a judicial enforcement mechanism for any administrative "judgment," there is no violation of the federal Separation of Powers doctrine. But South Carolina is different.

South Carolina's Separation of Powers Clause mandates that **"**the legislative, executive, and judicial powers of the government shall be **forever separate and distinct from each other**, and **no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other**." S.C. Const. art. I, § 8. These clear and unequivocal prohibitions do not permit any exceptions for "subsequent cure" through limited appellate judicial review. And the law at issue provides no option for a *de novo* hearing in the Courts.

Moreover, Respondents' argument ignores that the South Carolina Constitution expressly requires the Courts to have ***original jurisdiction*** over common law claims in Article V, § 11:

> ***SECTION 11. Jurisdiction of Circuit Court.***
>
> > *The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts[7], and shall have such appellate jurisdiction as provided by law;*

The power of the Judicial Branch "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). The CPO is not an "inferior court."

[7] South Carolina's Constitution, unlike constitutions of other states, does not allow the legislative branch to statutorily vest exclusive or original jurisdiction in any body other than a court, with the sole exception being "claims ***against*** the state" as provided in art. X, § 10, and art. XVII, § 2.

E. Federal Decisions Did Not "Shoot Down" *Carolina Glass.*

Respondents assert that the "federal Contract Disputes Act" establishes that *Carolina Glass* has been "shot down." This is simply wrong. Respondents also rely on "guidance" from federal decisions under the United States Constitution. The two are not analogous or related. They involve different jurisdictions, laws and constitutions. The federal government has never outsourced common law claims to an administrative official without affording the right of a full original or *de novo* hearing by a court of the Judicial Branch. Indeed, unlike South Carolina's process, federal contractors are entitled to a ***full de novo action in review*** from an administrative decision on a contract dispute to be heard by a Court of the Judicial Branch of the government, regardless of any contract clause or regulation to the contrary, to a *de novo* (not merely limited appellate review) action on the merits of all contract disputes in a Court of the Judicial Branch.[8]

Respondent's reliance on federal cases is unavailing because the federal government has never outsourced common law claims to an administrative official without affording the right of

---

[8] The Contract Disputes Act, 41 U.S.C. §7101 *et seq*. applies to contract claims only between Executive Branch agencies of the federal government and its contractors. 41 U.S.C. §7102. The Act in 41 U.S.C. §7103 provides that all claims by contractors against the government ((a)(1)) and by the federal government against contractors ((a)(3)) shall be first brought before the contracting officer for a decision. But the important distinction is that the federal Contract Disputes Act in §7103 specifically provides:

> **(b)Bringing an Action *De Novo* in Federal Court.—**
> (1)in lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board*, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.*
>
> * * *
>
> ***(b)(4)De novo.—***
> *An action under paragraph (1) or (2) shall proceed de novo in accordance with the rules of the appropriate court.*

full original or *de novo* hearing by a court of the judicial branch.[9] This is not a tax case, or a case involving legislatively created rights administered by agencies. Those are administrative matters and rights in origin, for which limited judicial review can serve to meet constitutional requirements. The fact that the federal Contract Disputes Act expressly affords contractors a right to a *de novo* trial by a Court of the Judicial Branch, when South Carolina's law does not, underscores Appellant's central point regarding the unconstitutional encroachment by the CPO upon the fundamental functions of the judiciary in violation of South Carolina's Separation of Powers Clause.

Carolina Glass is still the law in South Carolina. Limited appellate judicial review and provision for judicial enforcement do not serve to cure the constitutional defects observed in *Carolina Glass*:

> The Constitution ordains (Art. I, Sec. 14) that "the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." **This language is as strong as it is simple and clear. The Legislature therefore cannot assume to itself the exercise of judicial powers.** *Segars v. Parrott*, 54 S.C. 1. Nor can it confer "judicial powers," in the sense in which those words are used in the Constitution, upon any other body than the Courts mentioned and provided for in Section I, Article V, of the Constitution, which provides that "the judicial power of this State shall be vested in" the Courts therein specifically mentioned and provided for. The few instances in which judicial power is vested elsewhere are provided for in the Constitution itself, and with these few exceptions, the whole of the element of sovereignty known as judicial power was vested by the people in their Courts, and none of it was left to be lodged elsewhere. In fact, every person exercising the

[9] Even in the absence of an express Separation of Powers clause, the U.S. Supreme Court has repeatedly recognized that under the U.S. Constitution a "legislative court may not decide 'a suit at the common law or in equity, or admiralty' because each involves a judicial function." *Murray's Lessee v. Hoboken*, 59 U.S. 272, 15 L. Ed. 372 (1855). *See also Stern v. Marshall*, 564 U.S. 462, 483, 131 S.Ct. 2594, 2608, 180 L.Ed.2d 475 (2011).

> functions of either of the other departments of the government are forbidden to assume or discharge those vested in the Courts.
>
> * * *
>
> But **we find no authority in the Constitution for the Legislature to provide by law how claims of the State against others shall be established or adjusted, except through the Courts**.

Carolina Glass, at 290-91, 293 (emphasis added). *Carolina Glass* directly addresses Separation of Powers in the context of claims by the State, and *Unisys* does not.

II. The Disputes Clause Cannot Vest Jurisdiction.

Respondents' reliance on the Disputes clause is flawed for several reasons. First, the Disputes clause cannot be used to vest subject matter jurisdiction where none exists. Second, as written, the Disputes clause *supports* Appellants' position in its recognition of limitations to the CPO's jurisdictional authority and several alternative jurisdictional forums. Third, two Appellants were never party to a contract with the Disputes clause and cannot be bound by it.

A. The Parties' Agreement Cannot Confer Subject Matter Jurisdiction.

Respondents argue that regardless of whether S.C. Code Ann. § 11-35-4230 complies with the Separation of Powers Clause, Appellants consented to the CPO's jurisdiction, and are therefore barred from raising this jurisdictional issue. This argument is flawed because the **parties cannot confer subject matter jurisdiction on a forum by agreement, consent, or waiver.** *Anderson v. Anderson,* 299 S.C. 110, 382 S.E.2d 897 (1989); *American Agricultural Chemical Co. v. Thomas,* 206 S.C. 355, 34 S.E.2d 592 (1945); *Paschal v. Causey*, 309 S.C. 206, 209, 420 S.E.2d 863,865 (1992); *State v. Grim*, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000); *Plante v. State*, 315 S.C. 562, 563, 446 S.E.2d 437, 438 (1994).

Based on these and many other like authorities, alleged consent through signing a contract does not furnish a valid basis for conferring subject matter jurisdiction on the CPO to issue an enforceable award on common law claims by the State.

B. The Disputes Clause Does Not Vest the CPO with Exclusive Jurisdiction, Instead Recognizing Three Possible Forums.

Contrary to Respondents' argument, the Disputes clause does not vest the CPO with exclusive jurisdiction to hear the State's claims against Appellants, nor does it state that the CPO will hear any claims "first" as Respondents wrongly claim. The Disputes Clause itself undermines Respondents' claim that the CPO is the "sole" means to decide contract disputes by expressly recognizing **three** proper forums, not one: (1) the CPO, when he possesses jurisdiction; and when he lacks jurisdiction; (2) the Court of Common Pleas in Richland County; and (3) the Federal Court situated in Richland County.

> ***DISPUTES (JAN 2006)***
> *(1) Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws,* ***or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina****. Contractor agrees that any act by the Government regarding the Agreement is not a waiver of either the Government's sovereign immunity or the Government's immunity under the Eleventh Amendment of the United States Constitution. As used in this paragraph, the term "Agreement" means any transaction or agreement arising out of, relating to, or contemplated by the solicitation.*
> *(2)* ***Service of Process. Contractor consents that any papers, notices, or process necessary or proper for the initiation or continuation of any disputes, claims, or controversies relating to the Agreement; for any court action in connection therewith****; or for the entry of judgment on any award made, may be served on Contractor by certified mail (return receipt requested) addressed to Contractor at the address provided as the Notice Address on Page Two or by personal service or by any other manner that is permitted by law, in or outside South Carolina. Notice by certified mail is deemed duly given upon deposit in the United States mail.*

Id., (*emphasis added*). *See also,* Respondents' Initial Brief at 5, notes 1 and 2.[10]

The contract recognizes that there are cases where the CPO would "lack jurisdiction," and it provides for those to be handled by the Courts. It also concedes that the CPO may hear the cases over which he does have jurisdiction—but says nothing about cases where he lacks jurisdiction. By signing the contract, the parties did not agree to expand the CPO's legal jurisdiction, nor did they confer upon the CPO jurisdiction over claims brought ***by the State.***

Moreover, the clause mentions "waiver" and "consent," but not in the manner Respondents assert. The only "consent" referenced is to service of process. There is no expressed "waiver" of any constitutional (or other) rights. The only "waiver" referenced is the non-waiver of any government immunity.

In South Carolina, a "waiver" must be a "voluntary relinquishment of a known right." *Zeller v. Cumberland Truck Sales*, 272 S.C. 558, 253 S.E.2d 111 (1979). It will not be implied from doubtful acts. *Id.* A clause recognizing three possible jurisdictional forums is hardly a "waiver" of two of them. As written, the clause simply does not state that the CPO would "first decide" disputes, as Respondents assert.

The parties did not waive jurisdiction as a defense, or as an issue, and no party waived its constitutional rights. Such a waiver would need to be clear and unambiguous, not a matter of inference.

> Courts indulge every reasonable presumption against a waiver of fundamental constitutional rights. The burden rests upon the party relying on a waiver to prove

[10] The signed contracts are not in the record. There is no page in the record showing what entities are parties to the contracts. The purchase orders in the record for the ICAP matter show they are issued to an entity called "Tapfin." The web link referenced in Respondents' Initial Brief does not link to the relevant records. However, Appellants do not dispute that the above quoted "Disputes" clause text is a part of the State's and Clemson's standard terms and conditions.

> the essentials of such waiver by clear, precise and unequivocal evidence. The evidence must not leave the matter to mere inference or conjecture but must be certain in every particular.

White v. Commonwealth, 214 Va. 559, 560, 203 S.E.2d 443 (1974) (internal citations omitted).[11]

C. Not all Appellants Were Parties to the Disputes Clause Contract.

Not all Appellants—specifically Barry Newkirk and Neil Richards—are contract parties. Mr. Newkirk signed the agreement as the representative of ICAP, but he did not sign on his own behalf. Mr. Richards, a mere employee, did not sign the contract in any capacity. Accordingly, any arguments based on agreement, consent, and waiver have no bearing on the rights of Newkirk and Richards to seek declaratory relief.

D. Appellants' Action Was Timely.

Respondents imply that Appellants should have contested the jurisdictional statute via declaratory judgment at the time they "entered contracts with the government." Respondents' Initial Brief at 22. However, courts do not accept unripe cases or cases without an actual controversy. *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co*., 279 S.C. 64, 301 S.E.2d 761 (1983). The issues did not become ripe until the state agencies brought claims against Appellants before the CPO. That is when Appellants raised them.

III. The Respondents' Jury Trial "Waiver" Argument Is Equally Flawed.

The Respondents argue Appellants waived their right to a jury trial. This argument is based on *Unisys* and merely repeats their erroneous waiver and consent argument discussed above. And like those arguments, it suffers from the same flaws. The Disputes Clause does not apply to persons

[11] Respondents' citation to an arbitration case is unavailing. An agreement to arbitrate cannot be enforced unless it complies with the detailed specifics of the Arbitration Act, S.C. Code Ann. § 15-48-10, and that Act does not apply here.

who are not parties to it; the Clause does not mention a jury; and it does not say that the right to a jury trial is being waived.

The jury trial analysis in the *Unisys* decision hinges entirely on Unisys's claims against the State, rather than the claims by the State against Unisys. Although claims against the State were prohibited by sovereign immunity when the Constitution was established in 1895, as *Unisys* recites, the doctrine of sovereign immunity does not apply to claims ***by the State***, which is the issue here. The *Unisys* analysis, reasoning, and logic simply do not apply to this case.

CONCLUSION

State agencies have made common law claims against Appellants for tens of millions of dollars. The South Carolina Constitution guarantees Appellants a right to defend themselves in a circuit court and a trial by jury. But S.C. Code Ann. § 11-35-4230 impermissibly revokes Appellants' constitutional rights, instead granting the CPO exclusive original jurisdiction to hear all common law disputes involving a government contract.

South Carolina's Separation of Powers Clause is clear and unequivocal, forbidding the law's treatment of claims *by the State. Carolina Glass* established this ruling long ago. S.C. Code Ann. § 11-35-4230 is unconstitutional on its face because it assigns a core function of the Judicial Branch to an executive official, and limited appellate judicial review and enforcement does not cure the separation of powers violation.

Moreover, the parties' agreement cannot confer subject matter jurisdiction. The Disputes Clause recognizes three possible forums, and finally not all Appellants were parties to the Disputes Clause contract.

For all these reasons, this Court should issue an Order that S.C. Code Ann. § 11-35-4230 is partially unconstitutional and forbidding its application to claims asserted by the State.

Respectfully submitted,

/s/ John E. Schmidt, III
John E. Schmidt, III
S.C. Bar No. 4973
John@SchmidtCopeland.com
Melissa J. Copeland
S.C. Bar No. 5904
Missy@SchmidtCopeland.com
1201 Main Street, Suite 1980
Columbia, SC 29201
803.748.1342 (phone)
803.748.1210 (fax)

Attorneys for Appellants

THE CARPENTER LAW FIRM

/s/ James G. Carpenter
James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, South Carolina 29601
864-235-1269

Attorneys for Appellants JMI Sports, LLC and JMIS College, LLC

January 8, 2024