

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

**APPELLANTS' MOTION
TO ARGUE AGAINST PRECEDENT**

October 16, 2024

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STATEMENT OF THE CASE

Appellants signed service contracts with the State and one of its agencies (“State”). Based on these agreements, the State asserted legal and equitable claims against each Appellant before the State’s Chief Procurement Officer (“CPO”) under S.C. Code Ann. § 11-35-4230, the Contract Controversy Statute:

(1) Applicability. This section applies to controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. **The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor**, when the subcontractor is the real party in interest, concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code.

Id., (emphasis added).

Notably, the State, rather than the Appellants, brought the claim for breach of contract. Appellants then sued in Circuit Court to declare S.C. Code Ann. § 11-35-4230 unconstitutional, as it purports to authorize the CPO to hear and decide claims by the State.¹ Accordingly, Appellants argued that S.C. Code Ann. § 11-35-4230 violates the S.C. Constitution separation of powers clause, art. I, § 8; the original jurisdiction clause, art. V, § § 1, 11; and right to a jury trial, art. I, § 14, because it purports to grant authority to an administrative tribunal to hear claims brought by the state.²

¹ Appellant JMI Sports brought its claims against the State before the CPO, not to court, pursuant to S.C. Constitution, art. X, § 10, and art. XVII, § 2, and S.C. Code Ann. § 11-35-4230. Appellant ICAP asserted no claims against the State.

² JMI Complaint-Petition for Declaratory and Injunctive Relief filed May 20, 2022.

In response, the State moved to dismiss Appellants' cases for failure to exhaust administrative remedies before the CPO.³ The Circuit Court then granted the dismissal.⁴ Finally, Appellants moved for reconsideration, arguing that the CPO lacks judicial power to issue a Declaratory Judgment.⁵ The Circuit Court then denied the motions for reconsideration, relying on *Unisys v. South Carolina Budget and Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001).⁶

MOTION TO ARGUE AGAINST PRECEDENT

SCACR 217 governs motions to argue against precedent.

Permission of the appellate court shall not be required to argue against precedent in the brief. Oral argument against precedent shall not be permitted except upon leave of the appellate court in which the case is then pending, pursuant to motion in accordance with Rule 240 filed at least fifteen (15) days prior to oral argument.

Id. In view of oral argument, Appellants move the Court for permission to argue against precedent, namely *Unisys*.

I. South Carolina Common Law is Conflicted on the Constitutional Issues Before the Court.

First, this Court has issued two divergent opinions on whether the State may assign to a nonjudicial agency the authority to hear and rule on cases that a State agency brings. The two cases arrive at opposite conclusions.

In *Carolina Glass Co. v. State*, this Court correctly held, “[W]e find **no authority** in the Constitution for the Legislature to provide by law how **claims of the State** against others shall be

³ Defendant Chief Procurement Officer’s Motion to Dismiss filed June 15, 2022; Defendant Clemson University’s Motion to Dismiss, filed June 15, 2022; Defendant South Carolina Workers’ Compensation Commission’s Motion to Dismiss filed June 16, 2022; Defendant Chief Procurement Officer’s Motion to Dismiss filed June 21, 2022.

⁴ Order on All Motions to Dismiss filed January 31, 2023.

⁵ JMI Sports Motion to Reconsider filed February 2, 2023; ICAP Motion to Reconsider filed February 2, 2023.

⁶ Form 4 and Order on Plaintiff’s Motion for Reconsideration in *JMI Sports, et al. v. S.C. State Fiscal Accountability Authority, et al.* filed April 13, 2023; Form 4 and Order on Plaintiff’s Motion for Reconsideration in *Intellectual Capitol, Inc., et al. v. S.C. Workers’ Compensation Commission, et al.* filed April 13, 2023

established or adjusted, **except through the Courts.**” *Id.*, 87 S.C. 270, 293, 69 S.E. 391, 399 (1910) (emphasis added).

Specifically, Circuit courts have original jurisdiction, art. V, § 1, 11, and defendants sued by the State are entitled to a judicial forum. Likewise, the Constitution grants power to the judiciary, rather than to the executive branch, to interpret the law and cases brought by the executive branch. *Id.*

Furthermore, in *Carolina Glass*, this Court correctly held that the separation of powers clause, art. I, § 8, prohibits the General Assembly from enacting a law that authorizes a body or officer outside the judicial branch to hear and decide a common law claim brought by the State against a contractor. *Carolina Glass* held that no extrajudicial body or officer can have jurisdiction over such a claim.

II. The *Unisys* Ruling Rests on Faulty Reasoning.

The *Unisys* Court failed to distinguish claims *by the State* against individuals from claims *against the State*, when interpreting the South Carolina Constitution’s sovereign immunity from provisions governing claims against the State. Furthermore, the Court failed to consider how the separation of powers, the original jurisdiction, and the right to a jury trial, art. I, § 14, would distinctly govern the two different kinds of claims.

Admittedly, “[t]he General Assembly may direct, by law, in what manner claims against the State may be established and adjusted.” S.C. Const. art. X, § 10 and art. XVII, § 2 (*emphasis added*). However, the Constitution makes no allowance to the General Assembly to direct claims by the State. The distinction between claims by the state and claims against the state is outcome-determinative.

Unisys overlooked this distinction between claims made by the state and claims made against the state and erroneously stated, “There is no constitutional provision limiting the legislature’s power to establish jurisdiction for actions brought by the State, and the legislature may provide for such actions as it sees fit.” *Id.*, 346 S.C. 158, 551 S.E.2d 263, 270 (2001) (*emphasis added*).

The South Carolina Constitution establishes sovereign immunity and legislative control for claims brought against the State. However, the South Carolina Constitution grants original jurisdiction for claims brought in accordance with fundamental South Carolina Constitutional guarantees of separation of powers, the original jurisdiction of the state courts, and the right to a jury trial. An executive branch hearing deprives Appellants of their Constitutional right to a jury trial as a defendant.

Accordingly, this Court should overrule *Unisys* to the extent it relates to claims by the State against individuals and companies.

CONCLUSION

Appellants respectfully request the Court to follow the holding of *Carolina Glass*, reject the reasoning of *Unisys* insofar as it relates to claims brought by the State, and invalidate S.C. Code Ann. § 11-35-4230 to the extent it purports to allow the State CPO to hear and decide claims at law asserted *by the State* for recovery of money against private parties. Instead, the South Carolina Constitution directs state claims against private parties to the South Carolina courts for impartial judicial action in their original jurisdiction. Accordingly, Appellants pray the Court for permission to argue against *Unisys* as precedent, to the extent it applies to claims by the State.

RESPECTFULLY SUBMITTED,

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