

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BAMBERG COUNTY  
In The Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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Case No. 2011-CP-05-00160

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Dr. Robert W. Denton and Dr. John P. May,  
d/b/a Edusystems, a general partnership,

Appellants,

v.

Denmark Technical College and  
South Carolina State Board for Technical  
and Comprehensive Education,

Respondents,

v.

Dr. John K. Waddell,

Third Party Defendant.

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APPELLANTS PETITION FOR REHEARING

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Appellants respectfully submit this rehearing petition, as to matters which may have been over-looked or misapprehended in its opinion 2013-UP-485 (December 23, 2013) which affirmed the Trial Court's grant of Summary Judgment against them on the relief requested in their complaint.

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**SC Court of Appeals**

THE COURT'S OPINION MISAPPREHENDED THE JURISDICTIONAL LIMITATIONS ARTICULATED IN *UNISYS CORP. V. SOUTH CAROLINA BUDGET & CONTROL BOARD DIVISION OF GENERAL SERVICES INFORMATION TECHNOLOGY MANGEMENT OFFICE*.

In its opinion, Paragraph 1, the Court distinguishes the case of *Unisys Corp. vs. South Carolina Budget Control Board, Division of General Services Information Technology Management Office*, 346 S.C. 158, 551 S.E.2d 263 (2001). The opinion does this on the basis that the State in the *Unisys* case had invoked the remedy provided in the Consolidated Procurement Code, 346 S.C. at 164, 551 S.E.2d at 267, and because of that choice of forum the Supreme Court held that the Circuit Court did not have jurisdiction to hear the same dispute over the same contract. *Id.* at 176-177, 551 S.E.2d at 273. The opinion here observing that, neither party invoked the procedures in the Consolidated Procurement Code.

Appellants would respectfully submit that the Court overlooked the express, repeated language in *Unisys* holding that disputes such as this one are exclusively within the jurisdiction of the Procurement Code panel. Any jurisdiction of the Circuit Court is Appellate. As the Supreme Court held, *Unisys*, 346 S.C. at 170: "Application of the strict construction rule...results in upholding the exclusivity provision of §11-35-4230." And, *Unisys* holds the term statutory exclusive means, when strictly construed, is sufficient to wrench jurisdiction from the Circuit Court. *Id.*

The Court analogized Worker's Compensation claims, for which the established administrative forum is the exclusive remedy; effectively the Circuit Court is divested of subject matter jurisdiction of such cases. Like consideration apply in this case. See *Martinez v. Spartanburg County*, Appellate Case No. 2011-202268, filed January 8, 2014. Rehearing is

requested on this issue.

THE COURT ERRONEOUSLY HELD THE APPELLANTS WERE ABSOLUTELY  
REQUIRED TO COMPLY WITH PROCUREMENT CODE.

In Paragraph 2 of its opinion, the Court held Appellants were obligated to meet the terms of the Consolidated Procurement Code, citing *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 177-78, 420 S.E.2d 843, 846 (1992). Appellant respectfully submits the Court may have misapprehended and improperly expanded the cited language: “by the state acting through a governmental body” to include private parties. Rather, the plain language applies to the government alone. *Hitachi* certainly does not control, or even reach, the proposition that a contract signed by the President of a State TEC College, approved by its Board and its business Vice-President may be summarily annulled in a Rule 56 Summary Judgment hearing. It surely cannot be read to place an absolute burden, irrespective of the factual scenario, on citizens and businesses seeking to contract with our State.

Furthermore, President Waddell had the contracts submitted to the Denmark Technical College Board which approved them. It is thus respectfully submitted that the Court may have overlooked or misapprehended this factual situation in affirming the Trial Court’s grant of Summary Judgment. Certainly the *Hitachi* case is inapposite to the facts here. It addressed the scope of the Procurement Review Board’s authority when such is initiated by protest or application. As the Appellants noted in their Brief at page 7, there is no statutory provision that authorizes or requires a contractor to insure that the governmental body is in compliance with the Procurement Code, yet the Trial Court placed that absolute burden on Appellants. Here the affidavit of President Waddell (R. p. 169, ¶ 8-9) established that he was advised proper steps had

been taken and accomplished to contract with Appellants. Like considerations apply to the quoted language from *Ahrens v. South Carolina Retirement Sys.*, 392 S.C. 340, 353, 709 S.E.2d 54, 60-61 (2011) (Brief of Appellant, p. 8) (this being the same case cited in the Brief of Appellant as *Ahrens v. State* and in the record as *Ahrens v. South Carolina Retirement Sys.* (R. p. 9)). The *Ahrens* language deals with matters not within the scope of an agent's authority. Here again, the President of the College with approval of his Board authorized the contract. Certainly factual issues regarding apparent agent authority arise which are not proper for summary adjudication. At minimum, there exists a fact dispute here as to the "scope of his authority". These concerns apply to both the "Sole Source" (R. pp. 6-7) and "Certification of Procurement" (R. p. 8) aspects of the Trial Court's Order granting Summary Judgment and the justifiable reliance of the Appellants.

#### THE TRIAL COURT ERRONEOUSLY RULED PURSUANT TO REGULATION 19-445.2015

The Court may have overlooked Appellants argument, (Brief of Appellant, pp. 9-10), that the Trial Court's reliance on the above Regulation (R. p. 10) was inapposite. There was nothing before the Trial Court to show fraud or bad faith, most certainly not within the rigorous standards of Rule 56 and certainly not in the standards required by Rule 9 SCRPC which require such to be pleaded. The affidavit of Dr. Waddell expressly denies such (R. p. 169, ¶14). Moreover, the contract was signed, as Appellant argued, *Id.* by the President of Denmark Technical College who was acting within the scope of his authority. Entailed here is the question whether businesses entering into contracts with our State must insure that the governmental body has complied with every regulation, not just every statute in the maze, at the risk of performing under

a contract and not being paid when they are repeatedly told by the President that such has been done. This case raises legitimate questions of fact as to this concern, and the Court is asked to reconsider the Trial Court's draconian application of Rule 56 in the factual setting here. It will also be noted that no written Order cancelling the contract was ever issued pursuant to the cited regulation, in the face of serious questions of ratification as Appellants worked under this and the precedent contract until a new President was installed at the College and abruptly stopped payments. The absence of this alone precludes summary judgment. The very regulation on which the Respondent and the Trial Court rely demands written notice with reasons for the termination of this contract. Further inquiry into the facts is necessary as no State Procurement Office has issued a written cancellation of the contract as mandated by the Regulation. Rather, Dr. Tobin stopped payment without any written determination, in an obvious usurpation of the exclusive power of the Budget and Control Board to adjudicate such matters. The Judge's reliance on the Regulation was not supported by law. Rehearing is requested.

#### THE COURT MISAPPREHENDED AND UNDULY LIMITED THE SCOPE OF THE EMERGENCY PROCUREMENT STATUTE

In its opinion at Paragraph 3, the Court ruled that the missing of an audit deadline was insufficient to justify the contract as an emergency procurement. However, among the cited proper conditions in the statute are contained: "critical economy and efficiency" and who, if not the College President, can make that determination?

The missing of an audit deadline must be considered in light of the circumstances at Denmark Technical College. As President Waddell pointed out in his deposition, shortly after his arrival, that State TEC President, Dr. Russell, contacted him and was "very concerned" about

the institution (Denmark Technical College) (R. p. 206, lines 4-9). Dr. Russell expressed “grave concern” that Denmark Technical College might have to be consolidated or close “if we didn’t correct” some of the deficiencies (R. p. 206, lines 10-13) (emphasis added). Concerns included, *inter alia*, audit timeliness and accreditation of the nursing program (R. p. 210, line 12 - p. 211, line 4). Appellants provided assistance with the establishment of the nursing program, to the extent that had they not been there it would not have gotten done (R. p. 214, line 22 - p. 215, line 4). Appellants provided expertise in dealing with the audit deadlines (R. p. 217, lines 14-21 - p. 218, line 24 - p. 219, line 11). Appellants did assist in dealing with the audit problem (R. p. 244, lines 6-8). It should be noted that Dr. Denton was on the board at the Southern Association of Colleges and Schools, “the board that decides the fate of the colleges and universities” (R. p. 258, lines 19-24). He was an expert with accreditation and Denmark Technical College was threatened with sanctions during Dr. Waddell’s term as Denmark Technical College President (R. p. 259, line 20 - p. 260, line 6). A loss of accreditation would result, in turn, in a loss of federal funding (R. p. 260, lines 13-18). The school was in danger of losing accreditation for its student teaching and retention program as well (R. p. 273, lines 5-8). Like the audit, these issues lead to accreditation problems (R. p. 273, lines 9-12). These matters constituted what Dr. Waddell felt was an emergency (R. p. 283, lines 14-22). As noted above, he was greeted on arrival with information from State TEC that if certain deficiencies were not met, the school could be closed. “We were under a deadline to get the job done, [Appellants] were the closest ones that I knew that had that expertise to help get the job done.” ( R. p. 284, lines 2-7). Note Dr. Waddell only went to Edusystems after being rebutted by State TEC.

*“Well, we were working on a deadline. Before we ever went to Edusystems, that wasn't the first group we went to. The first group would have been consultants sent from State TEC. Dr. Russell- we would have been paying the person coming from other schools as consultants. They wouldn't get us consultants, so that's when we went to Edusystems.”*  
(R. p. 248, lines 19-25).

Certainly other schools, such as USC or Clemson, do not inaugurate their President with a call advising that the institution will be closed, if certain actions are not promptly effected. A reasonable interpretation of “critical economy and efficiency” as set out in the statute would fit the above scenario which Dr. Waddell confronted when he took the helm at Denmark Technical College. The Court has overlooked this reasonable interpretation of the applicable law.

#### THE EMERGENCY PROCUREMENT ISSUE IS NOT PROCEDURARLY BARRED

While the Court has ruled on the merits of the substantive issue in Paragraph 3 as discussed above, Appellant would respectfully note the issue is preserved for review by this Court. Citing the case of *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) the Court notes “[i]t is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the Trial Court to be preserved”. The affidavit of Dr. Waddell clearly stated that the VP of Business of TEC told him and the Denmark Board that he had contacted the State Board for TEC as well as the Budget and Control Board and had obtained the correct procedures to move forward with hiring Edusystems (R. p. 168). Dr. Waddell's affidavit was not addressed in the Order granting Respondent Summary Judgment. Appellants addressed the issues of sole source and emergency procurement in the Motion to Alter or Amend (R. pp. 174-176). The Court denied that Motion by Order of June 17, 2010 (R. p. 12). Reference was made to the December 16, 2011 deposition of Dr. Waddell, however the substance of the

facts is contained in his affidavit (R. pp. 168-169). The Reply to the Motion contended that the Appellant's argument was a "re-hash" of previous arguments or an attempt to argue the issue for the first time (R. p. 192). The Order denying the Motion does not indicate any reliance on the position that the argument was raised for the first time in the Rule 59e Motion (R. p. 12). Further, the matter was raised sufficiently in the Brief of Appellant.

Appellant attacks the Trial Court's decision based upon the Procurement Code, S.C. Code Ann. §11-35-10 (Brief of Appellant, pp. 4-5). The Brief notes that President Waddell instructed his Vice President for Business to obtain approval and instruction as proper procurement procedures. (Brief of Appellant, p. 5). The Brief discusses the existence of an emergency situation at Denmark Technical College, the unique abilities of Appellants and the advice Dr. Waddell received that the procurement was proper (Brief of Appellant, p. 6). The Brief cites to Appellant's Supplement to the Motion to Alter or Amend the Order granting Summary Judgment (Brief of Appellant, p. 6). That Motion argues Dr. Waddell's determination that an emergency situation existed (R. p. 196) and that CFO Bonnette had advised the contract could be done as an emergency procurement through a sole source contract (R. p. 197 - p. 199). The issues are thus preserved and argued in Appellant's Brief.

#### SUMMARY JUDGMENT WAS ERRONEOUSLY AFFIRMED

Regarding Paragraph 4 of its opinion, the Court has overlooked significant and genuine issues of material fact in determining that Summary Judgment was properly granted in this case and agreeing with the Circuit Court that a verdict for Appellant was not reasonably possible under the facts presented.

The case is a suit for moneys due under a contract for consulting services provided by Appellants, pursuant to a contract entered into by them and Denmark Technical College, signed by its then President, Dr. John Waddell. The affidavit of Dr. R. W. Denton, Appellant, indicates an unpaid balance of \$42,000.00 on the second of two contracts for consultation (R. p. 300). The decision of the Court in denying this claim was that the agreement was not a legitimate sole source contract, and that it did not receive certification at the State level as required by all contracts above \$50,000.00 (R. pp. 6-9). The Court does not, in its opinion, consider Appellants argument (Brief of Appellant, p. 5), that there are facts which support their good faith reliance upon the contract in performing services, *Ahrens, Id.*

Dr. Waddell, the President of Denmark Technical College, arrived at the College and was faced with problems in filing a timely audit. After he received no assistance from the CFO at Midlands Tech or the other college toward upper state but received none with regards to the audit. Dr. Waddell then discussed employing Appellants with members of his Board individually and collectively (R. pp. 168-169). He instructed the Vice President for Business to contact the State Board for Technical and Comprehensive Education and the Budget and Control Board for approval and instruction on the proper procurement procedures for retaining Appellants. *Id.*, (R. p. 169). He further averred:

*“10. The Vice President of Business instructed myself and the Denmark Board that to properly hire Edusystems, the Denmark Board would need to vote for an emergency procurement and to adjust the institution’s companion rule book accordingly.*

*11. These steps were carried out and the Denmark Board there after voted to retain Edusystems.*

*12. Prior to signing contracts with Eduystems, I had the Vice President of Business review and approve them.*

*13. Upon their hiring, a representative of Edusystems attended all Denmark Board meetings and provided status updates on the services being provided by*

*Edusystems.*”  
*Id.* (R. p. 169, ¶10-13).  
Note, V.P. Bonnett signed direct expenditure vouchers for payment to Edusystems. (R. pp. 264 & 265)

The Court has held the contract void, ipso facto, without any consideration of the Appellants good faith reliance on the signature of the Denmark Technical College President in entering upon the contract. Certainly Summary Judgment is not proper where citizens dealing with the State raise genuine questions of reliance. An important factual and legal determination must be resolved here and it cannot be done through Summary Judgment. If, assuming arguendo a vendor has a duty to investigate the veracity of a TEC President and the School’s Board in executing a contract, how far does that duty extend? How much diligence is due? The Court’s Order indicates there never can be enough. Vendors apparently assume 100% of the risk that their agreement with our State is a valid one. The Court in its opinion has overlooked consideration of these critical points, which were brought to the Court’s attention at the Brief of Appellant, p. 8:

*“In the matter of HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 699 S.E. 2d 699 (Ct. App. 2010), the Appellant Court held “...where the officers or agents of a governmental body act within the proper scope of their authority, a municipality cannot escape liability on a contract within its power to make, on the ground that the officer executing it on its behalf was not technically authorized to do so, where he was the proper person to enter into such a contract.”*

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*“As early as 1976, our Supreme Court expressed the identical view in Tournes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E. 2d 773 (1976). Tournes also concludes that “the failure of the City Council to ratify a formal contract under the facts of this case was a mere technicality not entitling it to escape liability for the reasonable value of Plaintiff’s services.”*

Further, the Court does not refute Appellants argument distinguishing and concerning the *Ahrens and Service Management* cases (Brief of Appellant, pp. 8-9) (change of law and

erroneous misconstruction of a contract). As argued, the President signed the contract and it was approved by the Board, State TEC and local Board (R. pp. 168, 169, 249, & 250). There was performance for a year and eight months and Denmark Technical College stopped paying without notice, despite S. C. Code Ann. §11-35-1520, and without any written determination, as required.

The Court may have overlooked an additional ground. The Trial Court should not have granted Summary Judgment in the face of conflicting factual accounts. As Appellants pointed out in the Brief at page 4, a court considering Summary Judgment neither makes factual determination, nor considers the merits of competing testimony. *Rawlinson Road Homeowners Assoc., Inc., v. Jackson*, Opinion 4893 (S.C. App. 9-28-2011). As argued in Appellants Brief at page 5, the Trial Court did not consider the affidavit of Dr. Waddell or that of Appellant, Dr. Denton, which as discussed above created material issues of fact, precluding decision by Summary Judgment. Summary Judgment was improper both as to “Sole Source” (R. pp. 6-7) and “Certification Procurement” grounds (R. p. 8).

#### THE COURT OVERLOOKED APPELLANTS ARGUMENT THAT THE COURT GRANTED SUMMARY JUDGMENT WHILE DISCOVERY WAS PENDING

In their Motion to Reconsider, Appellants pointed out to the Trial Court that it was improper to grant Summary Judgment while discovery was outstanding and the Plaintiffs had an outstanding Motion to Compel (R. p. 174, ¶4 and p. 179). The Rule 59(e) SCRPC Motion to Alter or Amend was, nevertheless, denied without comment. As Appellants argued in their Brief, Summary Judgment is a drastic remedy and it must not be granted until the opposing party has had a full and fair opportunity to complete discovery, *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

## CONCLUSION

As discussed previously, when Dr. Waddell arrived as President of Denmark Technical College he was advised of the existence of drastic circumstances which if not corrected could result in the loss of accreditation, closure, or consolidation of the College.

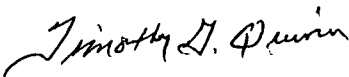
Dr. Waddell, faced with this revelation, determined that an emergency existed and that he needed expert guidance to remedy these problems. He sought assistance from the State Board and only when he was unsuccessful did he consider employing Edusystems. He had some familiarity with the principals and knew of their experience in accreditation, management, and higher education. He then advised his local Board and State TEC that he felt that Edusystems could alleviate there problems. With approval from both Boards he entered into a one year contract with Edusystems. Prior to entering into the contract he discussed doing so with his Vice-President for Business who advised him that it could be done as an emergency procurement. Relying on this advice, he instructed his Vice-President to insure that such employment was properly done and that he had secured all necessary authorization. Only after he had received assurances that all was properly done, did he enter into a contract with Edusystems. At the same time of the first contract he realized that one year of guidance and consulting would not be sufficient so he executed a second one year contract. This too was approved by his Board, the State Board and his Vice-President for Business. He conveyed his information to Edusystems and they began working with the problems facing the College. This contractual relationship continued for a total of twenty months. When Dr. Waddell was terminated, an interim President was appointed and without notice or explanation payments were abruptly stopped. This litigation subsequently began.

Without reiteration the Appellants contend that the decision of this Court was the result of misapprehension, overlooking of critical issues of fact and errors of law concerning such facts.

It is respectfully contended that both Courts overlooked, misapprehended or made errors of law as to issues involving, among other things, the fact that neither party choose the forum provided by the Consolidated Procurement Code for this dispute while only the Appellants were held to its strict standards, justifiable reliance and estoppel as applicable to the Appellants, established standards governing summary judgment, and the distinguishing factors of the cases relied on.

Again, the Appellants urge that they be granted a rehearing or that the matter be remanded to the State Procurement Panel for adjudication.

Respectfully Submitted,

  
Timothy G. Quinn  
Post Office Drawer 12589  
Columbia, South Carolina 29211  
(803) 771-0936  
Fax: (803) 254-7751  
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM BAMBERG COUNTY  
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Doyet A. Early, III, Circuit Court Judge

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Third Party Defendant.

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PROOF OF SERVICE

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I certify that I have served the Appellants Petition for Rehearing on the other parties by depositing a copy of it in the United States Mail, postage prepaid, on January 14, 2014, addressed to their attorney of record as follows:

David Duff  
Joseph Daniel Dickey, Jr.  
PO Box 1486  
Columbia, SC 29202

Robert Tyson, Jr.  
Thornwell Sowell, III  
PO Box 11449  
Columbia, SC 29211

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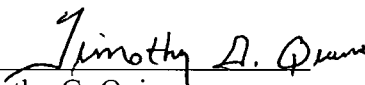
JAN 14 2014

**SC Court of Appeals**

and

Margaret Fox  
James M. Griffin  
1513 Hampton Street  
Columbia, SC 29201

January 14, 2014

  
\_\_\_\_\_  
Timothy G. Quinn  
2309 Devine Street  
Columbia, South Carolina 29205  
Phone (803)771-0936  
Fax (803)254-7751  
Attorney for Appellant