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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
In The Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2013-UP-485 (S.C. Ct. App. Filed Dec. 23, 2013)

On Certiorari from the Court of Appeals

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

Petitioners,

v.

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

Respondents,

v.

Dr. John K. Waddell,

Third Party Defendant.

PETITION FOR A WRIT OF CERTIORARI

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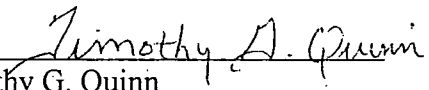
SC Court of Appeals

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals by its Order dated February 3, 2014.



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Attorney for Petitioners

QUESTIONS PRESENTED

- I. WHETHER THE COURT OF APPEALS INCORRECTLY RULED THAT THE CIRCUIT COURT HAD JURISDICTION OF THIS CONTRACT DISPUTE BETWEEN VENDORS AND DENMARK TECH, WHERE THE *UNISYS* CASE EXPRESSLY HOLDS THAT EXCLUSIVE JURISDICTION OF SUCH MATTERS IS IN THE REVIEW PANEL OF BUDGET AND CONTROL BOARD.

- II. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT TO RESPONDENT, OVERLOOKING SEVERAL IMPORTANT PRECEDENTS OF THIS COURT IN REACHING THEIR DECISION.

- III. WHETHER THE COURT OF APPEALS ERRONEOUSLY HELD THE APPELLANTS WERE ABSOLUTELY BOUND TO COMPLY WITH THE PROCUREMENT CODE.

- IV. WHETHER THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT PURSUANT TO PROCUREMENT CODE REGULATION 19-445.2015.

- V. WHETHER THE COURT OF APPEALS ERRONEOUSLY LIMITED THE SCOPE OF THE EMERGENCY PROCUREMENT STATUTE IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT AND IN RULING THAT THIS ISSUE WAS PROCEDURALLY BARRED.

STATEMENT OF THE CASE

Petitioners contracted with Respondent to provide consulting services to them (R. pp. 87-97). This contract was a follow-up to a prior one which had lasted for one year during which Petitioners were paid and no complaint was made as to their efforts under the contract (R. pp. 84-86). During the term of the second year, Dr. Waddell, the President of Denmark TEC, who had signed the contract (R. p. 91), was terminated.

The succeeding interim President, Dr. Tobin, stopped payments to Petitioners without expressed reason or written notice (R. p. 124 and R. pp. 68-69). Dr. Waddell has stated of Petitioners work pursuant to the contract "they did it to a level of excellence" (R. p. 268, lines 1-10). When Dr. Tobin was appointed interim President in August of 2009, he continued the services of Edusystems until Petitioners asked for compensation for June and July. Dr. Tobin then stopped returning calls or responding to e-mails (R. p. 69). A balance of \$42,000.00 remains due to Petitioners under the contract (R. p. 69).

Petitioners then commenced this action for breach of contract against Respondent by complaint filed in Richland County (R. pp. 13-17). Respondent answered and counterclaimed (R. pp. 27-36). It also filed a third party complaint against former Denmark TEC President Dr. James Waddell (R. pp. 50-59).

A reply was entered by Petitioners (R. pp. 45-47). Dr. Waddell answered the third party complaint (R. pp. 64-65).

The matter was transferred to Bamberg County. The counterclaim has not been adjudicated.

Both Petitioner and Respondent moved for summary judgment on Petitioner's Complaint

(R. pp. 67-72 and 73-75). Petitioner also filed an amended motion for summary judgment (R. p. 76 et seq.).

Respondent filed its memorandum of support of its motion for summary judgment (R. p. 290 et. seq.). A hearing was conducted in Bamberg before the Honorable Doyet Early on November 21, 2011. Judge Early granted Respondent's summary judgment motion and denied Petitioners' motion for summary judgment by his written Order dated December 9, 2011 (R. pp. 3-11).

Petitioners moved to alter or amend on December 27, 2011 (R. pp. 173-180 with enclosures). To this Respondents entered a reply (R. pp. 190-195). Petitioners supplemented its motion to alter or amend the judgment (R. p. 196 et. seq.). The trial court denied the Petitioners' Rule 59 motion by Form Order on January 18, 2012 (R. p. 12). Petitioners appealed to the Court of Appeals, which affirmed the Order granting summary judgment by unpublished opinion 2013-UP-485 (Heard September 11, 2013-Filed December 23, 2013). The Petitioners moved for rehearing which was denied by the Court of Appeals in an Order dated February 3, 2014. Petitioners now petition this court for a Writ of Certiorari to review the opinion of the Court of Appeals granting summary judgment to Respondent.

ARGUMENT I

THE COURT OF APPEALS INCORRECTLY RULED THAT THE CIRCUIT COURT HAD JURISDICTION OF THIS CONTRACT DISPUTE BETWEEN VENDORS AND DENMARK TECH, WHERE THE *UNISYS* CASE EXPRESSLY HOLDS THAT EXCLUSIVE JURISDICTION OF SUCH MATTERS IS IN THE REVIEW PANEL OF BUDGET AND CONTROL BOARD.

The Court of Appeals found in Paragraph 1 of its Opinion that the Circuit Court had subject matter jurisdiction to determine this dispute. This case was brought by Petitioners in Circuit Court (R. pp. 13-17). The case was for money damages on a contract between Edusystems, which had provided consulting services for Denmark TEC. Denmark TEC answered and counter-claimed. Both parties moved for summary judgment. Judge Doyet Early denied Petitioners' motion, and granted Denmark TEC's motion by Order dated December 9, 2004 (R. pp. 3-11).

In their reply brief in the Court of Appeals, signed January 24, 2013, Petitioners raised the issue of lack of subject matter jurisdiction to the Court of Appeals. They cited the controlling case *Unisys Corporation v. SC Budget and Control Board*, 346 SC 158, 55, SE 2d 263 (2001) which expressly holds that exclusive jurisdiction of matters as the one sub judice is in the review panel of the Budget and Control Board, not the Circuit Court. This is a specific exception to the jurisdictional grant in S.C. Code §15-77-50, based on the later language of the Consolidated Procurement Code (S.C. Code §11-35-4230). This Court held, *Unisys*, 346 SC at 170, "application of the strict construction rule results in upholding the exclusivity provision of §11-35-4230". The court held the statutory language is sufficient to "wrench jurisdiction" from the circuit court. *Id.* Thus, the reliance on the general jurisdictional language in the Court of

Appeals' opinion is erroneous. The Court did not consider the controlling language of *Unisys* in reaching its decision, and certiorari should be granted. It is to be noted that disregard of a controlling precedent of this Court is one of the stated criteria in SCACR Rule 242 (6)(b) favoring the grant of certiorari.

This case is not about exhaustion of administrative remedies, a discretionary doctrine. See, e.g. *Storm v. Charleston County Board of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012). There, a student who wished to attend the magnet school sued in circuit court, without exhausting her administrative remedy before the school board. This Court held the circuit court had jurisdiction, and that the Court had discretion to hear the case without exhausting any remedy before the school board.

Here, the situation directly involves jurisdiction of the subject matter. The most telling scenario would involve a person who was hurt on the job filing a lawsuit in Circuit Court, not filing with the Workers Compensation Commission. Clearly the Circuit Court could not hear the case and enter judgment for the Plaintiff, because the Court did not have jurisdiction of the subject matter. Here, the language of *Unisys* could not be plainer. The panel has exclusive jurisdiction of contract claims by vendors against the state. Thus, the trial court here lacked subject matter jurisdiction of the case.

That being done, the Court should order a remand of this case from the Circuit Court to the review panel. By way of persuasive analogy, the court may consider *Mack v. Nationwide Mutual Insurance Company*, 245 S.C. 619, 142 S.E.2d 50 (1965). There, it was held that a Plaintiff who had filed a case in the wrong venue could have their case transferred to the proper one. The Plaintiff was not estopped from moving to transfer their case to the proper county.

Like considerations apply here. The matter can be sent to the review panel which has exclusive subject matter jurisdiction of the dispute pursuant to *Unisys*, supra.

ARGUMENT II

THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT TO RESPONDENT, OVERLOOKING SEVERAL IMPORTANT PRECEDENTS OF THIS COURT IN REACHING THEIR DECISION.

The trial court granted summary judgment because Defendant TEC, not the Petitioners, had not obtained a proper approval of sole source procurement and because the Budget and Control Board had not certified the procurement which was for over \$50,000.00 (R. pp. 6-8). In doing so the trial court, and the Court of Appeals in turn in paragraph 4, adopted an absolutist position that any defect in the contract approval process, even if not caused by the vendor, permits the state to void the contract. In so doing, the Court of Appeals provided little in the way of analysis, basically a summary affirmance. In particular, the Court overlooked Petitioners' argument based on two controlling precedents of this Court, cited in Appellant's Brief at Page 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.”

“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.”

Not only did the Court of Appeals not consider these cases, the situation here appears to be novel. (See SCACR 242 (6)(1) concerning cases favoring grant of certiorari). This is not a mere situation of passivity but one where the Respondent's President had full authority to sign

the contract and indeed it was voted for by the Denmark Board (R. p. 169).

Further, the Court of Appeals did not refute arguments distinguishing and concerning the fact that the President of the school signed the contract; there is not any issue as to his actual authority to enter into contracts on behalf of his school. It must be remembered also that President Waddell had been advised that TEC was in compliance with the contract requirements (R. p. 169). While this was contradicted by the affidavit of Clarence Bonnett (R. pp. 170-171), a court considering summary judgment does not consider the merits of competing testimony, e.g. *Rawlinson Road Homeowners Assoc., Inc., v. Jackson*, 395 S.C. 25, 716 S.E.2d 337 (2011).

The critical point at this juncture is that the Court of Appeals did not take into account *HHHunt* and *Tournes* in its analysis. These cases articulate the sound principle that a vendor does not do business in this State at her or his absolute “peril” when the state seeks to void a contract based on problems the State, not the vendor, has caused in the procurement process.

Furthermore, in their Motion to Reconsider, Petitioners pointed out to the Trial Court that it was improper to grant Summary Judgment while discovery was outstanding and the Petitioners had an outstanding Motion to Compel (R. p. 174; ¶4 and p. 179). The Rule 59(e) SCRC Motion to Alter or Amend was, nevertheless, denied without comment. As Petitioners 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).

Summary judgment as affirmed by the Court of Appeals is certainly not the vehicle to resolve such disputes. Petitioners worked on the instant and its predecessor contract for over a year, only to have it ended without written notice as required by S.C. Code §11-35-1520, and indeed with no explanation whatsoever (R. p. 69). Certiorari should be granted.

ARGUMENT III

THE COURT OF APPEALS ERRONEOUSLY HELD THE APPELLANTS WERE ABSOLUTELY BOUND TO COMPLY WITH THE PROCUREMENT CODE.

In its opinion affirming summary judgment (Paragraph 2) the Court of Appeals cited *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 177-78, 420 S.E.2d 843, 846 (1992) to the point that vendors are obligated to meet the terms of the consolidated procurement code. The Court of Appeals erroneously expanded the relevant language “by the state acting through a government body” beyond its plain and common sense meaning, to include private parties. Petitioners would respectfully contend this language applies to the State. *Hitachi* while cited, does not reach, much less control the factual scenario here. The effect of the Court of Appeals decision is to nullify a contract signed by the President of the contracting college and approved by its Board. *Hitachi* should not be applied so broadly- the Court of Appeals decision penalizes vendors for the mistakes of the state in following its own procurement code. Petitioners submit certiorari should be granted to determine whether the expansive reading afforded *Hitachi* applies here, especially in the context of the drastic remedy of summary judgment.

Hitachi deals with the scope of the Procurement Review Board’s authority, that Board being a creature of statute. Nothing in the statute sets forth any requirements concerning any obligation of a vendor to assure that a governmental agency is in compliance with the Procurement Code. Yet, the effect of the Court of Appeals decision is exactly that. Here, even the signatory President of the college had been advised that proper steps had been taken to assure the validity of the contract in question (R. p. 169).

Certiorari is also needed to consider the Court of Appeals misapplication of *Ahrens v. South Carolina Retirement Sys.*, 392 S.C. 340, 353, 709 S.E.2d 54, 60-61 (2011). *Ahrens* held

that a "contract" allegedly created by statements and forms provided by the S. C. Retirement System was contrary to the existing statute. Here, in contrast, the President was an authorized signatory to the contract. He himself had been assured the requirements for the contract had been fulfilled (R. p. 169), Petitioners performed admirably according to President Waddell, for over a year under the instant and predecessor contract (E.g. R. p. 268). Then, payments were stopped in violation of statute.

Petitioners respectfully submit this result is well beyond the holding of *Ahrens* as it is applied to affirm the Trial Judge's Grant of Summary Judgment. In fact the issues of ratification and estoppel are not refuted by the citation of *Ahrens*.

ARGUMENT IV

THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT PURSUANT TO PROCUREMENT CODE REGULATION 19-445.2015.

In paragraph 2, the Court of Appeals affirmed the Trial Court's grant of Summary Judgment pursuant to Regulation 19-445.2015 of the Procurement Code. The Trial Court's ruling (R. p. 10) discussed a contract that was procured fraudulently or in bad faith, being voided. However, in this case, there is no evidence much less disputed evidence to support such a finding. In fact the affidavit of Dr. Waddell expressly denies any such (R. p. 169, ¶14).

The Trial Court's further holding that the contract is null and void is well refuted by the *HHHunt* and *Tournes* cases discussed above in Argument II. The Court of Appeals affirmed Judge Early without considering Petitioners arguments concerning these cases which hold that a contract is valid despite errors in the procurement process, particularly errors committed by the governmental body. *HHHunt* and *Tournes* clearly denote that a good faith vendor will not be barred from enforcement of their contracts by defects in the procurement process which are not of their making. When our state recruits out-of-state businesses to locate here do our development personnel tell them that they contract with this state "at their peril" of having their contracts nullified due to procurement defects they did not cause? Furthermore, certiorari is required to determine if good faith vendors must insure the government has complied with every regulation as well as every statutory requirement, in the complex field of Procurement. Certainly application of Rule 56 here was improper. Also with regard to the applicability of the Regulation, it must be noted that the Respondent has not complied with the very regulation relied upon to grant Summary Judgment. No written cancellation of the contract as required by the

regulation ever occurred. Dr. Tobin simply stopped returning Petitioners calls and emails (R. p. 69). Questions of ratification also remain unanswered as the Petitioners performed their contract to the complete satisfaction of President Waddell (R. p. 268). All these facts are of such moment as to preclude Summary Judgment. Further inquiry into the facts is the failure of the State to comply with the requirement of written cancellation if necessary. Rule 56 SCACP. Certiorari is needed to determine if summary judgment correctly lies to resolve this dispute involving vendors and the State.

ARGUMENT V

THE COURT OF APPEALS ERRONEOUSLY LIMITED THE SCOPE OF THE EMERGENCY PROCUREMENT STATUTE IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT AND IN RULING THAT THIS ISSUE WAS PROCEDURALLY BARRED.

In its opinion at Paragraph 3, the Court of Appeals held that the missing of an audit deadline was insufficient to justify the contract here as an Emergency Procurement, (permitting sole source contracting rather than bidding). It did not consider the language "critical economy and efficiency", which is a stated basis, *inter alia*, in the statute providing for an Emergency Procurement, S.C. Code §11-35-1570. The Court of Appeals also did not consider the whole scenario that was facing Dr. Waddell when he took the reins at Denmark TEC, and his unsuccessful efforts to receive help "in-house" before he turned to Petitioners (R. pp. 168-169). Certiorari is required to interpret what the cited statutory language means. It is broader in its plain meaning than the other stated bases in the Procurement statute. President Waddell stated why he contracted with Petitioners:

"But shortly after I arrived there, The State Tech President, Dr. Barry Russell, contacted me and was very concerned about the institution. He expressed to me his grave concern that it might even have to be consolidated or closed (emphasis added) if we didn't correct some of the deficiencies as he described them."
(R. p. 206, lines 4-13)

Petitioners performed under their contract to insure these critical needs were met: concerns included, *inter alia*, audit timeliness and accreditation of the nursing program (R. p. 210, line 12 - p. 211, line 4). Petitioners 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). Petitioners provided expertise in dealing with the audit deadlines

(R. p. 217, lines 14-21 - p. 218, line 24 - p. 219, line 11). Petitioners did assist in dealing with the audit problem (R. p. 244, lines 6-8). It should be noted that Dr. Denton had previously served on the board of 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 indeed 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).

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, [Petitioners] were the closest ones that I knew that had that expertise to help get the job done.” (R. p. 284, lines 2-7). And, it is worth noting that Petitioners were not the first resource Dr. Waddell contacted in an effort to resolve the problems he inherited. He attempted to get help from State TEC and was not able to receive it (R. p. 248, lines 19-25 and R. pp. 168-169). Petitioners submit certiorari lies to consider the meaning of “critical economy and efficiency” in the context of a newly hired college president who is advised by his President that his school is under threat of being closed. The Court of Appeals opinion does not address these critical matters, and it is especially erroneous in the context of affirming a grant of Summary Judgment.

Furthermore, the Court of Appeals erroneously held that this argument was procedurally barred. The Court cited *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) for

the point 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. Here, the affidavit of Dr. Waddell clearly stated the VP for Business at Denmark TEC had advised him that he had contacted State TEC and 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 Trial Court's Order granting Summary Judgment. Petitioners addressed "sole source" and emergency procurement in the Motion to Alter or Amend Judgment. That motion was denied by a Form Order (R. p. 12). That motion made reference to Dr. Waddell's deposition of December, 16, 2011, but the essential facts were also in his affidavit. The reply to the motion to alter or amend contended Petitioners' argument was a "re-hash" of previous arguments or an attempt to argue the issue for the first time. The Form Order denying the motion does not adjudicate any reliance on the position that the argument was raised for the first time in the Rule 59 motion. Thus, the Court of Appeals' reliance on *Pye* is mistaken as the matter was before the trial court.

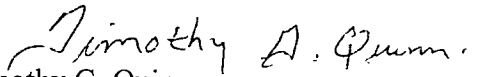
Furthermore, the matter was raised sufficiently to the Court of Appeals in the Brief of Appellant. Edusystems argued against the Trial Court's decision based upon the Procurement Code, S.C. Code Ann. §11-35-10 (Brief of Appellant, pp. 4-5). The Brief notes that President Waddell instructed his Vice President for Business to obtain approval and instruction as to 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 Edusystems and the advice Dr. Waddell received that the procurement was proper (Brief of Appellant, p. 6). The Brief cites to the 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 V.P. Bonnette had advised the contract could be handled as an emergency procurement through a sole source contract (R. p. 197 - p. 199). Thus, preservation requirements were met, and the Court is asked to grant certiorari to consider the scope of the statutory language concerning emergency procurement. It is asked to do so in the context here that the school was threatened with being closed or consolidated.

CONCLUSION

For the reasons stated, Petitioners ask the Court to grant the petition for a writ of certiorari.

Respectfully Submitted,


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March 5, 2014

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Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2013-UP-485 (S.C. Ct. App. Filed Dec. 23, 2013)

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APPENDIX TO THE
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Dr. John K. Waddell,

Third Party Defendant.

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and Appendix (without enclosures) by hand delivering a copy to the Court of Appeals and depositing a copy of it in the United States Mail, postage prepaid, on March 5, 2014, addressed to their attorney of record as follows:

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March 5, 2014

VIA HAND DELIVERY

S.C. Court of Appeals

Re: Denton, et al. v. Denmark Technical College, et al.
2013-UP-485

Dear Sir/Madam:

Enclosed and hereby served upon you is the Petition for a Writ of Certiorari, Appendix (without enclosures), and Proof of Service with regards to the above referenced matter. If you have any questions please do not hesitate to call.

Very truly yours,



Timothy G. Quinn

TGQ/lmm

Enclosures

cc: David Duff
Robert Tyson, Jr.
Edusystems

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