

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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FINAL REPLY BRIEF OF APPELLANT

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**SC Court of Appeals**

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## ARGUMENT

### I

#### THE TRIAL COURT ERRED IN GRANTING DENMARK TECHNICAL COLLEGE'S MOTION FOR SUMMARY JUDGMENT AS TO THE COMPLAINT

In this matter the Trial Court granted Summary Judgment in favor of the Respondent and denied the Summary Judgment of the Appellants.

For simplicity, the Respondent will be referred to as DTC and the Appellant will be referred to as Edusystems.

The issue on appeal is whether the Court's granting of DTC's Motion for Summary Judgment was proper under the facts presented to the Court. Addressing this issue Edusystems refers to the case of Stevens & Wilkinson v. City of Columbia, 396 S.C. 338, 721 S.E. 2d 455 (Ct. App. 2011). Stevens specifically holds:

*Summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. When there is conflicting evidence on some material issue, the court may not grant summary judgment. See Shirley's Iron Works, Inc., v. City of Union, 387 S.C. 389, 397, 693 S.E. 2d 1, 4 (Ct. App. 2010) ("At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." (Internal quotation marks omitted)). "If the evidence as to the existence of a contract is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury." Armstrong v. Collins, 366 S.C. 204, 223, 621 S.E. 2d 368, 377 (Ct. App. 2005); see also Small v. Springs Indus., Inc., 292 S.C. 481, 483, 357 S.E. 2d 452, 454*

*(1987) (Same).*

While Edusystems will subsequently discuss the summary judgment standard, it must be noted that the Trial Court placed the obligation on Edusystems not only to insure that the President of DTC (Dr. Waddell) had authority to enter into the contracts but further to insure that Dr. Waddell's staff would properly carry out the procurement process. The Court's Order if literally applied would require every vendor contracting with a State Agency to go beyond the officer's authority and insure that each involved administrative or State Agency would properly do theirs. It is submitted that this would be an impossible burden.

After arguing to the contrary on many occasions, it appears that DTC now concedes that Dr. Waddell as President of the college "may" have had the authority to enter into such contract. DTC instead argues that Dr. Waddell had no authority to enter into an agreement, if the consulting contract came about in a manner that failed to comply with DTC's purchasing policies and state law, (R. p. 341).

Again DTC appears to be arguing that a vendor must reasonably verify the officer's authority, but such vendor is not entitled to rely on the officer's verbal assurances. Dr. Waddell's verbal assurances to Edusystems are rampant in his deposition of 12-16-2011. Excerpts from this deposition were attached to the Plaintiffs' Supplement to its Motion to Alter or Amend the Court's Order Granting Summary Judgment in favor of Denmark Technical College. (R. pp. 205-289)

The Trial Court apparently did not consider the deposition of Dr. Waddell, asserting that it was not filed on a timely basis, Order of December 9, 2011, Footnote 1 on page 3 (R. p. 5). It must be noted that Dr. Waddell's deposition was taken by the attorney for DTC on December 16,

2011 and was discussed at length in Edusystems initial Motion to Alter or Amend (R. p. 173) and when the transcript was received it was included in the supplement to the motion (R. p. 196).

The Trial Court's failure to consider this deposition testimony seems contrary to Rule 15, SCRPC and the cases of Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E. 2d 153 (1999) and Collins Entertainment, Inc., v. White, 363 S.C. 546, 611 S.E. 2d 262 (Ct. App. 2000).

DTC could obviously suffer no prejudice by this supplemental motion as it was DTC's attorney who took this deposition.

The position of Edusystems was further supported by the affidavits of Dr. Waddell (R. pp. 168-169) and Dr. Denton (R. pp. 68-69) while there were conflicting affidavits in behalf of DTC. It has been ruled error to accept as true one party's affidavit while disregarding the other party's. Team 1A v. Lucas, 395 S.C. 237, 717 S.E. 2d 103 (Ct. App. 2011).

As was stated in Team 1A, "Summary judgment is inappropriate if the facts are conflicting or the inferences to be drawn from the facts are doubtful". The conflicting affidavits clearly raise issues of material fact which would preclude summary judgment. Smith v. Willard, 287 S.C. 122, 337 S.E. 2d 239 (Ct. App. 1985).

Considering the allegation of the Plaintiffs that DTC agreed to but failed to pay for the remaining four months of their contract, the sum of \$42,500.00. There clearly were ample precedents why the Trial Court should not have issued summary judgment. Discovery was still outstanding which should have been completed prior to the Trial Court rendering summary judgment. Evening Post v. Berkley, 392 S.C. 76, 708 S.E. 2d 745 (2011).

For reasons as set forth above, the Appellants believe that the Trial Court erred.

## ARGUMENT

### II

#### THE CIRCUIT COURT LACKED JURISDICTION TO ENTERTAIN THE COUNTERCLAIM OF DENMARK TECHNICAL COLLEGE

This action was originally filed in the Circuit Court for Richland County. Following a series of pre-trial motions, certain discovery was exchanged and the matter was removed to Bamberg County.

It was only in response to the Plaintiffs' Motion for Summary Judgment that DTC asserted that the transaction between the Plaintiffs and DTC were governed by the South Carolina Consolidated Procurement Code. S.C. Code §11-35-10, et seq. (R. pp. 73-75)

As a state agency, DTC is required to comply with the provisions of the South Carolina Consolidated Procurement Code (hereinafter referred to as CPC). S.C. Code §11-35-45(B). DTC was obviously aware of the CPC and argued the application of such before the Trial Court. The Trial Court agreed with this argument and premised its Order on the CPC. It would appear that DTC, rather than filing a counterclaim, had an obligation to move the contract and breach of contract controversy to the CPC's resolution authority. The failure of the DTC to do so, precludes the college from asserting any affirmative defenses or a counterclaim. As S.C. Code §11-35-4230 requires controversy's between the governmental body and the contractor to resort to the CPC when such controversy concerns a contract solicited and awarded pursuant to the provisions of the code.

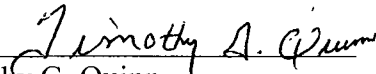
Contrary to the very code that DTC relies on, it attempts to use code procedures in the

circuit court to otherwise defeat or impair any otherwise valid contract claims.

In the matter of Unisys Corporation v. S.C. Budget and Control Board Division, 346 S.C. 158, 551 SE 2d 263 (2001) the Court considered this issue and found that the CPC was the exclusive means of resolving the dispute between the parties. For these reasons, the Trial Court lacked jurisdiction to entertain the affirmative defenses of DTC and erred in doing so.

### CONCLUSION

Wherefore, the Appellant seeks the reversal of the Trial Court's Order and the removal of this matter to the jurisdiction of the S.C. Consolidated Procurement Code.

  
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PROOF OF SERVICE

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I certify that I have served the Final Reply Brief of Appellant on the other parties by depositing a copy of it in the United States Mail, postage prepaid, on January 25, 2013, addressed to their attorney of record as follows:

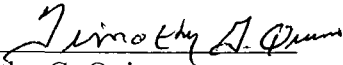
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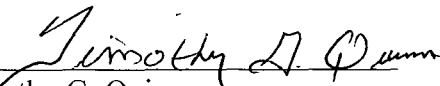
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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that the Final Reply Brief of Appellant is in compliance  
with Rule 211(b), SCACR.

  
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