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Contracts

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CONTRACTS

I. SOVEREIGN IMMUNITY

In *Kinsey Construction Co. v. South Carolina Department of Mental Health*[1] the South Carolina Supreme Court held that whenever "the State of South Carolina pursuant to statutory authority enters into a valid contract, the State implicitly consents to be sued and waives its sovereign immunity to the extent of its contractual obligations."[2] *Kinsey* thus provides that the state's action of lawfully entering into an authorized contract constitutes consent to be sued on that contract.

At common law, under the doctrine of sovereign immunity, no action would lie against the state without its consent.[3] South Carolina courts traditionally interpreted this doctrine to require the state's "express" consent to suit, such consent being in the form of legislative authority.[4] In 1931, however, the supreme court held in *Chick Springs Water Co. v. State Highway Department*[5] that no legislative authority to sue the state was necessary when the suit involved the taking of private property for public use without just compensation. The court found that the constitutional provision involved[6] was self-executing and that no further waiver of immunity was required.[7] *Chick Springs* held that there were two methods by which the state could waive its immunity: express statutory language or a self-executing constitutional provision.

Harris v. Fulp[8] reaffirmed the position that the state enjoyed immunity from suit unless waived expressly. Since *Harris* it has generally been thought "that the State was immune from lawsuits, whether in contract or in tort, and that consent to be sued could not arise by implication."[9] Indeed, in cases *ex delicto* it has been expressly stated that a waiver of governmental immunity

1. ___ S.C. ___, 249 S.E.2d 900 (1978).
2. *Id.* at ___, 249 S.E.2d at 903.
3. 49 AM. JUR. *States, Territories and Dependencies* § 91 (1943).
4. Lowry v. Commissioner of Land, 25 S.C. 416, 419, 1 S.E. 141, 143 (1886).
5. 159 S.C. 481, 157 S.E. 842 (1931).
6. S.C. CONST. art. I, § 13 prohibits the taking of private property for public use without just compensation.
7. 159 S.C. at 497, 157 S.E. at 848.
8. 178 S.C. 332, 183 S.E. 158 (1935).
9. Record at 44, Kinsey Constr. Co. v. South Carolina Dep't of Mental Health, ___ S.C. ___, 249 S.E.2d 900 (1978).

can never arise by implication.[10] In contrast, *Kinsey* now holds that sovereign immunity can be waived by implication in contract actions.[11]

The contract in dispute in *Kinsey* was originally awarded to Phillips Construction Company to build an alcohol and drug addiction center for the South Carolina Department of Mental Health. The contract was subsequently assigned by Phillips to Kinsey Construction Company with the written consent of the Department. Thereafter, the Department became dissatisfied with Kinsey's performance and terminated the contract. Kinsey then instituted an action against the Department for breach of contract. When its demurrer was overruled the Department appealed.[12]

Two grounds for demurrer were at issue before the supreme court. The Department's first contention was that the state enjoyed sovereign immunity which precluded a suit to recover damages on a contract breached by a state agency. Second, the Department asserted that article 3, section 30 of the South Carolina Constitution[13] was applicable and rendered unconstitutional an award of extra compensation to a contractor after services had been performed under a contract.[14]

In discussing the immunity issue, the supreme court agreed with the Department that, absent a waiver of immunity, an individual cannot maintain an action against the state. The court did not agree, however, that immunity can only be waived by a self-executing provision of the Constitution or by express statutory language. The majority held that when the state enters into a contract that was authorized by the legislature, the state has consented to be sued in the event it breaches the contract.[15]

The holding of the court, that the state implicitly consents to be sued on authorized contracts, is not surprising in light of the number of other jurisdictions that have adopted this view.[16] Sur-

10. Brazell v. City of Camden, 238 S.C. 580, 121 S.E.2d 221 (1961); McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959).

11. ___ S.C. at ___, 249 S.E.2d at 903.

12. *Id.* at ___, 249 S.E.2d at 901-02.

13. See text accompanying note 36 *infra*.

14. ___ S.C. at ___, 249 S.E.2d at 902.

15. *Id.* at ___, 249 S.E.2d at 903.

16. George & Lynch, Inc. v. State, 57 Del. 158, 197 A.2d 734 (1964); Grant Constr. Co. v. Burns, 92 Idaho 408, 443 P.2d 1005 (1968); Carr v. State, 127 Ind. 204, 26 N.E. 778 (1891); Kersten Co. v. Department of Social Servs., 207 N.W.2d 117 (Iowa 1973); V.S. Di

prising, however, is the court's implication that its holding represented no change in existing South Carolina law. Prior to the *Kinsey* decision, ostensibly it was the "established doctrine of South Carolina that the State was immune from lawsuits, whether in contract or in tort, and that consent to be sued could not arise by implication."[17]

The court in *Kinsey* stated that its holding was in accord with the court's 1936 decision in *Chesterfield County v. State Highway Department.*[18] In that case, Chesterfield County brought an action to compel the state treasurer to turn over for cancellation certain bonds purchased from the county pursuant to its contract with the state. The court denied the county's petition, stating that an adequate remedy existed at law:

> It is true that the statutes which authorize the making of the contract do not in express language confer upon either contracting party the power to sue the other for breach of contract. But that right is one of necessary implication; it is a common-law right.
>
> . . . We hold that the authority given to make the contract carries with it, by necessary implication, the authority to enforce the contract by an action at law.[19]

This language is the basis for the supreme court's statement in *Kinsey* that its decision "finds support" in the *Chesterfield County* decision.[20] The majority does not state that it viewed *Chesterfield County* as binding precedent for its decision in *Kinsey.* Because of the differences between the two cases,[21] the court presumably could have limited *Chesterfield County* to its own facts and reached a contrary conclusion in *Kinsey.*

The lone dissent in *Kinsey* centered on whether the circuit courts have jurisdiction to hear cases involving claims against the state. In his dissent Justice Littlejohn interpreted section 2-9-10

Carlo Constr. Co. v. State, 485 S.W.2d 52 (Mo. 1972); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); P.T. & L. Constr. Co. v. Commissioner of Dep't of Transp., 60 N.J. 308, 288 A.2d 574 (1972).

17. Record at 44, Kinsey Constr. Co. v. South Carolina Dep't of Mental Health, ___ S.C. ___, 249 S.E.2d 900 (1978).

18. 181 S.C. 323, 187 S.E. 548 (1936).

19. *Id.* at 329, 187 S.E. at 550.

20. ___ S.C. at ___, 249 S.E.2d at 902.

21. *Chesterfield County* involved the appropriateness of issuing a writ of mandamus, 181 S.C. at 324, 187 S.E. at 549, whereas *Kinsey* was a suit seeking payment for goods or services rendered, ___ S.C. at ___, 249 S.E.2d at 901.

of the South Carolina Code[22] as requiring Kinsey to submit its claim to the State Budget and Control Board. Section 2-9-10 provides that "[a]ll claims for the payment for services rendered or supplies furnished to the State shall be presented to the State Budget and Control Board by petition, fully setting forth the facts upon which such claim is based, together with such evidence thereof as the Board may require."[23] The statute was adopted pursuant to article 17, section 2 of the South Carolina Constitution, which provides that "[t]he General Assembly may direct, by law, in what manner claims against the State may be established and adjusted."[24] Justice Littlejohn distinguished *Chesterfield County* because it did not involve an action for "services rendered or supplies furnished" to the state and found that the statute was therefore inapplicable to that case.[25]

The majority rejected the argument that the State Budget and Control Board has exclusive jurisdiction and pointed out that article 5, section 7 of the South Carolina Constitution[26] grants general jurisdiction in civil and criminal cases to the circuit court. The majority did not reach the issue whether article 17, section 2 grants the General Assembly authority to remove jurisdiction from the circuit court in suits against the state. Instead, it interpreted South Carolina Code section 15-77-50[27] as indicating legislative intent to specifically grant the circuit court jurisdiction over civil actions against a state agency. That section mandates that "[t]he circuit courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies . . . , affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise."[28]

According to the dissent's reasoning, the state could never be sued in circuit court for payment for services rendered or supplies furnished. Even suits that involve express statutory consent to be

22. S.C. CODE ANN. § 2-9-10 (1976).

23. *Id.*

24. S.C. CONST. art. 17, § 2.

25. ___ S.C. at ___, 249 S.E.2d at 904 (Littlejohn, J., dissenting).

26. S.C. CONST. art. 5, § 7. The constitutional provision reads: "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 . . . ." *Id.*

27. S.C. CODE ANN. § 15-77-50 (1976).

28. *Id.*

sued and that involve self-executing provisions of the constitution would seem to be foreclosed. The supreme court has traditionally allowed individuals to sue the state in circuit court in such cases, holding that sovereign immunity was waived.[29] *Kinsey* does not hold that the state can be sued when it enjoys sovereign immunity. When the state's immunity is intact, presumably the majority would agree with the dissent that claims should be processed through the State Budget and Control Board. It is only when the state has waived its immunity to suit that an action can be brought in circuit court. The importance of *Kinsey* is that it allows the waiver of immunity to be implied when the legislature has authorized the making of a contract.

The majority's rationale in *Kinsey* is that the state should not have the power to contract with individuals and still retain the power to avoid its obligations.[30] The doctrine of sovereign immunity originated as a rule of social policy to protect the state from interference with its governmental functions and to preserve its control over state funds. Accordingly, subjecting the state to suits by any citizen was considered a threat to the state's control of its funds.[31] The extent to which *Kinsey* abrogates this rule of social policy depends upon the clarification that the case ultimately will receive from the courts.

As stated previously, *Kinsey* holds that when the state enters into a valid contract, it "implicitly consents to be sued and waives its sovereign immunity to the extent of its contractual obligations."[32] If "the extent of its contractual obligations" is later interpreted by the courts to mean that an individual plaintiff's recovery will be limited to the amount of the original contract, then the suit threatens no more of the state's funds than the state was already obligated to expend. This limitation, while preserving the policy behind the sovereign immunity doctrine, would undermine the apparent intent of the *Kinsey* majority to remove from the state the power to avoid its contractual obligations. Under this interpretation, the state would be able to cause plaintiffs serious delays and increased costs and then, if the costs

29. Moseley v. South Carolina Highway Dep't, 236 S.C. 499, 115 S.E.2d 172 (1960); Smith v. Greenville, 229 S.C. 252, 92 S.E.2d 639 (1956); Chesterfield County v. State Highway Dep't, 181 S.C. 323, 187 S.E. 548 (1936); Chick Springs Water Co. v. State Highway Dep't, 159 S.C. 481, 157 S.E. 842 (1931).

30. ___ S.C. at ___, 249 S.E.2d at 903.

31. 72 AM. JUR. 2d *States* § 99 (1974).

32. ___ S.C. at ___, 249 S.E.2d at 903.

exceeded the original contract price, avoid financial responsibility for such delays. Limiting the recovery to the original contract price would, therefore, defeat the purpose of holding that the state had waived its immunity to suit. No similar limitation has been imposed in cases in which the waiver of immunity was by express legislation or a self-executing constitutional provision.[33] Once the state's immunity has been waived in a contract action, the state should be liable for the damages attributable to its breach to the same extent that an individual would be held liable,[34] in the absence of constitutional or legislative authority to the contrary.

In *Kinsey,* the Department of Mental Health asserted that article 3, section 30 of the South Carolina Constitution[35] precluded any recovery in a contract action for damages above the contract price. Article 3, section 30 provides:

> The General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant, or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law, but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrection.[36]

The majority in *Kinsey* explicitly indicated that the decision made no determination of the effect of this constitutional provision; moreover, the court stated it could not say as a matter of law that Kinsey's claims constituted demands for extra compensation within the meaning of article 3, section 30.[37]

The South Carolina Supreme Court has not ruled on the effect of article 3, section 30 on construction contracts.[38] The trial court and both parties in *Kinsey,* however, agreed that the provision is intended to prohibit the giving of gratuities and the making of payments to public officials or contractors beyond that to which they are entitled by law or by a valid contract.[39] The provi-

33. *See* case cited in note 29 *supra.* It could also be argued that in a contract action, unlike a tort action, the state could predict the amount of damages likely to be assessed against it for breach with some fair degree of certainty. *See, e.g.,* Smith v. State, 289 N.C. 303, 318, 222 S.E.2d 412, 424 (1976).

34. *See* 289 N.C. at 318, 222 S.E.2d at 424.

35. S.C. CONST. art. 3, § 30.

36. *Id.*

37. ___ S.C. at ___, 249 S.E.2d at 904.

38. Record at 32.

39. *Id.;* Brief of Appellant at 20-21; Brief of Respondent at 24-25.

sion is not intended to prohibit the courts from "finding the legitimate amount of damages done to a litigant for breach of a contract."[40] This interpretation is consistent with a dissenting opinion by Chief Justice Lewis in *L-J, Inc. v. South Carolina State Highway Department,*[41] stating that the prohibition is aimed at the General Assembly and does not interfere with the jurisdiction of the courts to determine contractual rights between the parties.[42]

The opinions of the trial court in *Kinsey* and Chief Justice Lewis in *L-J* on the effect of article 3, section 30 in actions for breach of contract comport with the clear language of the constitutional provision as well as with the general view that a contractor's valid claim for damages does not constitute an increase in the price to be paid under the contract.[43] It would appear, therefore, that article 3, section 30 does not operate as a bar to Kinsey's recovery, provided that Kinsey has a valid legal claim to the alleged damages. If the claim is valid, then any damages awarded would be compensation for past services rendered,[44] and not in the nature of a gratuity prohibited by article 3, section 30.

Kinsey makes it clear that a majority of the South Carolina Supreme Court is receptive to modifications of the sovereign immunity doctrine, although the court is not prepared to specifically abolish the doctrine.[45] Nevertheless, as Justice Littlejohn pointed out, "for all practical purposes, [*Kinsey*] abolishes the doctrine of sovereign immunity as relates to contracts in this state."[46] Now the only prerequisite to maintaining a breach of contract action against the state is a showing that the state officer or agency entering into the contract was authorized to do so by statute.[47]

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40. Record at 33.
41. 270 S.C. 413, 242 S.E.2d 656 (1978).
42. *Id.* at 445, 242 S.E.2d at 670 (Lewis, C.J., dissenting).
43. 81A C.J.S. *States* § 173 (1977).
44. Record at 33.
45. *See* Brown v. Anderson County Hosp., 268 S.C. 479, 234 S.E.2d 873 (1977); Belton v. Richland Memorial Hosp., 263 S.C. 446, 211 S.E.2d 241 (1975).
46. ___ S.C. at ___, 249 S.E.2d at 905 (Littlejohn, J., dissenting).
47. *Id.* at ___, 249 S.E.2d at 903.

II. CONSTRUCTION CONTRACTS— RISK OF LOSS FROM UNANTICIPATED COSTS

In *L-J, Inc. v. South Carolina State Highway Department,*[48] the South Carolina Supreme Court held that plaintiff contractors were not entitled to additional compensation when they encountered substantially more rock than anticipated at a road construction site. L-J and Eastern Contractors were successful bidders[49] for a unit price contract to perform work on a road construction project in Greenville County. The unit price nature of the contract required contractors to bid a specific price for each unit of work; the number of total units of each class of work was estimated by the Department. The dispute arose over the compensation rate for removal of units of "unclassified material," which consisted of all subsurface matter whether it be sand, rock, clay, or dirt. Although the total number of units of unclassified material did not vary significantly from that estimated by the Department,[50] the project involved far more hard rock excavation than anticipated by the contractors. The Department paid the contractors at the unit price of $.34 per cubic yard for all unclassified material excavated.[51] The contractors brought suit[52] to recover expenses over and above the contract price, anticipated profit and financing charges incurred.[53]

In formulating their bid, the contractors had relied on bid materials furnished by the Department, including detailed cross-

48. 270 S.C. 413, 242 S.E.2d 656 (1978).

49. Plaintiffs' bid was $800,000 lower than the next highest bidder. Plaintiffs initially were concerned over the discrepancy between their bid and that of the other contractors. Consideration was given to rejecting the contract and forfeiting their bond. This procedure was rejected out of the fear that it would strain relations with the Department, with which plaintiffs did considerable business. *Id.* at 418, 242 S.E.2d at 657.

50. The contractor was to be paid at the unit price for the actual number of units completed. If the total number of units of unclassified material varied by 20% or more from the total estimated by the Department, the contract price was to be renegotiated. The total amount of unclassified material found by the lower court to have been excavated was 524,000 cubic yards above the Department's estimate of 8,067,924 cubic yards; the variance was well within the 20% limit. *Id.* at 419, 426, 242 S.E.2d at 658, 661.

51. *Id.* at 420, 242 S.E.2d at 658.

52. The action was brought pursuant to S.C. CODE ANN. § 33-72 (1962) (current version at S.C. CODE ANN. § 57-3-620 (1976)). Five causes of action were alleged: (1) mutual mistake; (2) false representations; (3) breach of implied warranty; (4) unjust enrichment; and (5) denial of due process of law and equal protection of the law as provided in the state and federal constitutions. 270 S.C. at 418, 242 S.E.2d at 657.

53. *Id.*

sections, a boring scroll, and a plan and profile of the project.[54] Prior to the bid, plaintiffs' representatives visited the construction site and examined the area. Although other bidders made subsurface testings, plaintiffs did not do so, relying instead upon the Department's information.[55] Whether the Department's bid information contained positive representations as to the subsurface conditions of the site, and, if so, whether the contractors' reliance upon the bid information was justified, were questions of fact before the trial court. The contract contained a notice that the material was furnished for informational purposes only and that work, whether increased or decreased, was to be performed at the unit price.[56]

At trial, Judge Grimball found that the Department's bid information constituted an implied warranty that the topography, to the extent described, was as represented. The court found that there was a mutual mistake by the contractors and the Department concerning the amount of rock present. In addition, the court found that reliance by the contractors on the Department's information was reasonable because of the limited twenty-one-day time period within which contractors were required to submit bids. The lower court allowed the contractors to recover $409,000 plus interest, the actual cost of excavating the amount of solid rock not anticipated by the contractors.[57]

The supreme court reversed the lower court decision and held that:

> The Contractors, having entered into a solemn agreement, must abide by the terms thereof. They took a risk for a consideration, and have no right to call upon the courts to protect them against the consequences of erroneous judgment formulated by their own carelessness and failure to make adequate tests and investigation prior to bidding.[58]

A majority of the court thus relied upon the fact that the contractors might have protected themselves by conducting their own subsurface testing. This ignores the finding of the trial court that the contractors' reliance on the Department's bid information

54. Record, vol. 1, at 1-3. For a brief explanation of "boring scroll," see 270 S.C. at 426, 242 S.E.2d at 661.

55. 270 S.C. at 426, 242 S.E.2d at 661.

56. *Id.* at 433, 242 S.E.2d at 665.

57. *Id.* at 419, 242 S.E.2d at 658.

58. *Id.* at 434-35, 242 S.E.2d at 665.

was reasonable under the circumstances.[59] The majority opinion refers to the accuracy of the boring scrolls furnished by the Department.[60] There was, however, evidence in the record of inaccurate boring information and cross sections, as well as material errors in the Department's plans.[61]

As a general rule, the supreme court lacks the power to overturn a determination of fact made by the trial court in an action at law[62] unless the appellate court finds that there was no evidence to support the trial court's decision.[63] The majority opinion does not hold that the findings of the trial judge were without support in the record. As pointed out by Chief Justice Lewis in his dissent, the majority appeared to be drawing its own inferences from the facts rather than limiting its review to a determination of whether the evidence supported the trial court's judgment.[64] Thus, although the majority decision is probably fair because the contractors could have protected themselves by conducting subsurface tests,[65] the decision is inconsistent with South Carolina precedent holding that the court generally should not delve into the facts on appeal.[66] The majority may be indicating that the court is extremely reluctant to afford relief to a contracting party merely because increased costs have caused performance to become overly burdensome. When the contracting party could have protected itself from the increased costs, *L-J* indicates that the supreme court will afford no relief.

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59. *Id.* at 441, 242 S.E.2d at 668-69 (Lewis, C.J., dissenting).

60. *Id.* at 431, 242 S.E.2d at 664.

61. Record, vol. 8, at 2315-16.

62. County Bank, Greenwood v. South Carolina Nat'l Bank, 244 S.C. 327, 137 S.E.2d 281 (1964); Beard v. Aiken County Stores, 175 S.C. 421, 179 S.E. 616 (1935).

63. Dillard v. Blackman, 258 S.C. 158, 187 S.E.2d 643 (1972); Fogle v. Void, 223 S.C. 83, 74 S.E.2d 358 (1953); Harrison v. Lanoway, 214 S.C. 294, 52 S.E.2d 264 (1949).

64. 270 S.C. at 445, 242 S.E.2d at 671 (Lewis, C.J., dissenting).

65. Based on their subsurface testings, all other contractors bid at least $800,000 more than plaintiffs. *Id.* at 418, 242 S.E.2d at 657. The $409,000 recovery awarded by the trial court was less than that discrepancy. *Id.* This indicates that plaintiffs would probably have bid high enough to cover their actual costs had they conducted their own subsurface tests.

66. See cases cited in note 62 *supra*.