The Supreme Court of South Carolina

In the Matter of Charles I. Gandy, Petitioner

Appellate Case No. 2013-001666

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 17, 1982, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated August 2, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Charles I Gandy shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

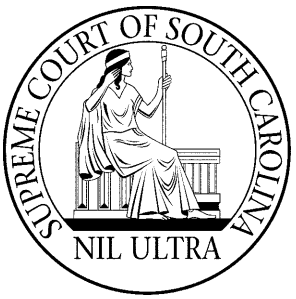
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
September 3, 2013



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40
September 11, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Diane R. Henderson, f/k/a Diane M. Reed, Respondent,

v.

Summerville Ford-Mercury Inc. and Capital One Auto Finance, Inc., Defendants,

Of whom, Summerville Ford-Mercury Inc. is the Appellant.

Appellate Case No. 2012-207606

Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 27313
Heard June 4, 2013 – Filed September 11, 2013

AFFIRMED

Robert Lawrence Reibold, of Walker & Reibold, LLC, of Columbia, for Appellant.

C. Steven Moskos, of Charleston, and Brooks Roberts Fudenberg, of Mount Pleasant, for Respondent.

JUSTICE BEATTY: In a matter of first impression, the Court is asked to determine if an unsuccessful party in an arbitration proceeding may prevent the

confirmation of an award by paying the award prior to the confirmation proceeding. The answer is no.

Diane Henderson ("Henderson") filed an action against Summerville Ford-Mercury, Inc. ("Dealer") alleging Dealer made misrepresentations to Henderson when she purchased a used vehicle. The circuit court granted Dealer's motion to compel arbitration, and an arbitrator found for Henderson on her claims for violation of the South Carolina Unfair Trade Practices Act ("UTPA") and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act").[1] Henderson moved to confirm the arbitration award, which was granted by the circuit court. Dealer appeals, arguing the circuit court erred (1) in rejecting Dealer's assertion that payment of the award mooted the request for confirmation, leaving no "justiciable controversy"; and alternatively (2) in applying the provision for confirming awards contained in the South Carolina Uniform Arbitration Act ("UAA"), rather than the Federal Arbitration Act ("FAA").[2] This Court certified the case for its review pursuant to Rule 204(b), SCACR. We affirm.

I. FACTS

Henderson visited Dealer and stated she was looking for a first vehicle for her daughter, and she stressed the importance of finding something safe and reliable. Henderson purchased a used 2003 Jeep Grand Cherokee from Dealer. The sales contract prepared by Dealer contained an arbitration provision that required any disputes to be submitted to binding arbitration that "shall be governed by the [FAA]."

After the purchase, Henderson experienced mechanical problems with the Jeep. She brought this action in the circuit court[3] alleging Dealer had specifically advised her that the Jeep had never been wrecked and that it had been well-

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[1] S.C. Code Ann. §§ 39-5-10 to -560 (1985 & Supp. 2012) (UTPA); S.C. Code Ann. §§ 56-15-10 to -600 (2006 & Supp. 2012) (Dealers Act).

[2] S.C. Code Ann. §§ 15-48-10 to -240 (2005 & Supp. 2012) (UAA); 9 U.S.C.A. §§ 1 to 16 (2009) (FAA).

[3] Capital One Auto Finance, Inc. was a defendant, but is not a party to this appeal.

maintained by one owner when, in fact, Dealer knew the Jeep had previously been wrecked and that it had been a commercial rental vehicle with more than one owner. Henderson asserted claims for violations of UTPA and the Dealers Act, as well as other claims. Dealer filed a motion to stay the proceeding and to compel arbitration. The circuit court granted Dealer's motion to compel and stayed Henderson's case pending arbitration.

The arbitrator issued an award of $18,875.71 to Henderson on her UTPA claim and $16,990.00 on her claim under the Dealers Act. In addition, the arbitrator awarded Henderson attorney's fees of $45,200.00 and costs of $3,076.39. The arbitrator denied Henderson's remaining claims and directed Henderson to elect one remedy from the two claims on which she had prevailed. Dealer did not move to vacate, modify, or correct the award.

Dealer refused to agree to a consent order to confirm the award. Henderson moved for confirmation of the award by the circuit court. In the interim, Dealer paid the award. At the confirmation hearing, Henderson noted the underlying action had been stayed pending arbitration and that it needed to be concluded in some manner. She argued that section 15-48-120 of the UAA mandated confirmation.

Dealer maintained that it had paid the award "almost immediately, within weeks of the arbitrator's decision," so the matter was moot because the purpose of confirmation was to enter a judgment that could be enforced. Dealer asserted Henderson "recites the [UAA] which is irrelevant because we moved to compel arbitration under the [FAA], and that's the statute under which arbitration was ultimately granted."

The court inquired of Dealer, "[N]ow you just [] don't want the [judgment] reflected in the [judgment] rolls of the County?" Dealer responded that it did "agree that as a record keeping matter something has to happen with this case," but maintained that dismissal under Rule 41(a), SCRCP was appropriate. Dealer stated the only purpose for confirmation of the judgment would be to enforce collection and that putting the judgment on the record now would only serve to give it "a bad name in the public record[.]"

The circuit court confirmed the arbitration award based on Dealer's violation of UTPA. The court applied section 15-48-120 of the UAA, which provides:

> Upon application of a party, the court *shall* confirm an award, *unless* within the time limits hereinafter imposed grounds are urged for *vacating or modifying or correcting the award*, in which case the court shall proceed as provided in §§ 15-48-130 [vacating award] and 15-48-140 [modification or correction of award].

S.C. Code Ann. § 15-48-120 (2005) (emphasis added). The circuit court found "[t]he use of the word 'shall' shows that confirmation by the Court is mandatory, not discretionary." The court concluded the only time a court is not required to confirm the award is when a party establishes grounds to vacate, modify, or correct the award, and Dealer had made no such motion. The circuit court directed the clerk of court to register the award as a judgment and to mark it paid in full.

II. STANDARD OF REVIEW

This Court may make its own ruling on a question of law without deferring to the circuit court. *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011); *see also Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 621 S.E.2d 344 (2005) (stating this Court may decide a novel question of law based on its own assessment of the reasoning that best comports with the law, public policy, and the Court's sense of law, justice, and right).

III. LAW/ANALYSIS

Dealer contends the circuit court erred (1) in applying the UAA confirmation procedure, and (2) in confirming the award where the matter was "not justiciable."[4]

A. Application of the FAA versus the UAA

It is undisputed that the arbitration proceedings, which culminated in an award to Henderson, were conducted pursuant to the FAA. The parties disagree, however, over whether the circuit court erred by applying the court's confirmation procedure set forth in the UAA instead of the FAA. For reasons discussed below,

[4] The propriety of the circuit court's order compelling arbitration and the merits of the arbitrator's ruling have not been challenged.

we conclude that it does not matter which act is applied as the result would be the same. The circuit court referenced section 15-48-120 of the UAA, quoted in full above, in confirming the award. The corresponding provision in the FAA is found in section 9 of the act:

> **§ 9. Award of arbitrators; confirmation; jurisdiction; procedure**
>
> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon *the court must grant such an order unless the award is vacated, modified, or corrected* as prescribed in sections 10 and 11 of this title. . . .

9 U.S.C.A. § 9 (2009) (emphasis added).

Initially, we note Dealer generally asserted at the hearing that the FAA applied rather than the UAA, but it did not specifically discuss the confirmation statutes of either act. Assuming the circuit court impliedly rejected the application of the FAA based on its utilization of the UAA, we question the sufficiency of Dealer's briefed argument, as it does not address the confirmation procedure under the FAA, 9 U.S.C.A. § 9, or how it has been prejudiced by the application of the UAA instead of the FAA. *See generally Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011) (holding an appellant must show both an erroneous ruling and prejudice to warrant reversal).

As to the merits, "[g]enerally, any arbitration agreement affecting interstate commerce . . . is subject to the FAA." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013). "Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363 (2001) (footnote omitted) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)).

The general rule is that the FAA does not preempt state ***procedural*** law relating to arbitration. 6 C.J.S. *Arbitration* § 32 (2004); *see also Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 n.6 (1989) (noting while the Supreme Court had held certain substantive provisions of the FAA were applicable in state and federal courts, it had never held that sections 3 and 4, which appeared by their references to the U.S. district court to apply only to proceedings in federal court, were applicable in state courts).

The one case cited by Dealer on this issue, *Toler's Cove Homeowners Association v. Trident Construction Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003), actually supports the application of the UAA here. In *Toler's Cove*, this Court observed, "There is no federal policy favoring arbitration under a certain set of *procedural rules* and the federal policy is simply to ensure the enforceability of private agreements to arbitrate." *Id.* at 611, 586 S.E.2d at 584 (emphasis added). The Court held a South Carolina procedural rule on the appealability of arbitration orders was applicable instead of the FAA rule because it did not invalidate the arbitration agreement or undermine the goals and policies of the FAA. *Id.* at 611, 586 S.E.2d at 584. To the contrary, the arbitration agreement was being enforced by the court's order compelling arbitration, which coincided with the FAA's policy in favor of the arbitration of disputes. *Id.*; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) ("[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" (citations omitted)).

In *Morgan Keegan & Co. v. Smythe*, No. W2010–01339–SC–R11–CV, 2013 WL 1775690, at *6-7 (Tenn. Apr. 25, 2013), the Supreme Court of Tennessee similarly concluded a provision in its state arbitration act, not the FAA, governed the appeal of orders confirming or vacating arbitration awards in state court. The court stated that, because this was a case involving interstate commerce heard in the Tennessee courts, both the FAA and the state UAA applied, which necessarily implicated the doctrine of preemption. *Id.* at *6. The court explained "[t]he [FAA] contains federal substantive law requiring the parties and the courts to honor arbitration agreements." *Id.* at *8. The court reasoned that the appeal provisions of the FAA were procedural, not substantive, and agreed with authority from other jurisdictions, including this state, which have held that state ***procedural*** provisions should not be preempted by the FAA unless they stand as an obstacle to the full purposes and objectives of Congress. *Id.*

In *Swissmex-Rapid S.A. de C.V. v. SP Systems, L.L.C.*, 151 Cal. Rptr. 3d 229, 233 (Ct. App. 2013), the California appellate court considered the "threshold issue . . . whether Section 9 of the FAA is procedural in nature, and therefore applicable only to federal court proceedings, or whether Section 9 is substantive, so as to be applicable in a state court proceeding to confirm an arbitration award." Citing the United States Supreme Court's decision in *Volt*, 489 U.S. at 477 n.6, the court stated, "While the substantive provisions of the FAA apply in state as well as federal court proceedings, the FAA's procedural provisions apply only in federal court." *Id.* The court also noted the FAA preempts only ***conflicting*** state law. *Id.* The court concluded section 9 of the FAA is procedural in nature, not substantive, as it was intended to implement the substantive provisions of the FAA in federal court proceedings, and it has no application in state court proceedings. *Id.* at 234-35.

In the current appeal, although the arbitration agreement stated the FAA would apply to the arbitration, it did not expressly state the FAA would apply to the subsequent procedure for confirmation once a final award was made. However, this is not a concern because the outcome would be the same. A similar situation occurred in *White v. Siemens*, 369 S.W.3d 911 (Tex. App. 2012). The Texas Court of Appeals considered an arbitration provision that stated the matter shall be governed by the FAA. *Id.* at 915. The court noted, "[h]owever, [that] the agreement did not expressly mention whether the FAA applied to confirmation of the award." *Id.* Siemens moved for confirmation of the arbitration award under the Texas General Arbitration Act (TAA), and the opposing parties asserted the FAA applied. *Id.* In resolving the dispute, the court "note[d] that the FAA and the TAA are not mutually exclusive" and observed the FAA preempts only contrary state law. *Id.* The court stated, "Even where the FAA applies to substantive issues, we apply Texas law to *procedural issues* in arbitration proceedings." *Id.* (emphasis added). The court ultimately found it need not determine whether the confirmation statute was procedural or substantive, however, because the result to confirm the award would be the same under either act since both mandated confirmation unless the statutory grounds were established for vacating, modifying, or correcting the award. *Id.* at 915-16.

Based on the foregoing, we hold section 9 of the FAA applies only in federal court and that the circuit court did not err in applying the UAA's confirmation provision in the matter before this Court because the confirmation statute is procedural, not substantive. The FAA's substantive provisions apply to arbitration

in federal or state courts, but a state's procedural rules apply in state court unless they conflict with or undermine the purpose of the FAA. Moreover, we find the outcome would be the same under either the FAA or the UAA, as both mandate confirmation unless grounds were established for vacating, modifying, or correcting the award, and such grounds were not asserted here. *See id.*; *cf. Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22 n.1, 644 S.E.2d 633, 667 n.1 (2007) (noting the UAA and the FAA provisions that applied to the issues were nearly identical so the analysis under either state or federal law was ultimately the same).

In *Swissmex*, the appellate court did note one difference in the FAA, which is that 9 U.S.C.A. § 9 requires the parties' arbitration agreement to specify that they consent to the entry of judgment for any award obtained. *Swissmex*, 151 Cal. Rptr. 3d at 235. However, as noted in *Swissmex*, even if the FAA's confirmation procedure applied, the parties could be deemed to have consented to entry of a judgment based on their agreement to apply the rules of the American Arbitration Association ("AAA"), as those rules are deemed incorporated into the contract and specifically provide the parties agree to entry of a judgment. *Id.* at 235-56.

B. Confirmation of Arbitration Award

Having found the UAA applies, we consider Dealer's further contention that the circuit court erred in confirming the arbitration award because its payment mooted the request, leaving no "justiciable controversy." This is a novel question in this state.

We find Dealer's argument to be without merit. Dealer concedes Henderson's underlying case had to be concluded in some fashion, as it was stayed pending arbitration. At the hearing in this matter, Dealer asserted the case should be dismissed under Rule 41(a), SCRCP. Henderson correctly argued that Rule 41(a) applies to voluntary dismissals and was not applicable here.[5] Confirmation is appropriate because by law a court must confirm an award upon application of a

[5] While a settlement would result in a dismissal, the dismissal is usually made with the consent of the parties because the matter is terminated prior to a disposition on the merits. An arbitration award is distinguishable from a settlement, as an arbitrator's award constitutes a third-party finding of fault on the claims asserted by the plaintiff.

party unless the defendant moves to vacate, modify, or correct the award and Dealer filed no such motion.

Dealer argues the only purpose for confirmation of an award is to obtain a judgment for enforcement in cases where payment is uncertain. Dealer cites to general authority on mootness and justiciability, and references some authorities that have found a defendant's payment moots the confirmation of an arbitration award, rendering it nonjusticiable. Dealer also cites *Corpus Juris Secundum* to support its theory that the only purpose of confirmation is to secure payment. However, Dealer omits the language we emphasize from the treatise, which indicates confirmation can serve multiple purposes. *See* 6 C.J.S. *Arbitration* § 178 (2004) ("[T]he proceeding ordinarily is not initiated unless one of the parties refuses to abide by the award *or unless it be the desire of a party that an official record of the confirmation and judgment be made*." (emphasis added)).

Confirmation is not a separate judicial process; it is merely a continuation of the arbitration procedure. *See generally* 6 C.J.S. *Arbitration* § 181 (2004) (stating a proceeding for confirmation of an arbitration award is not a trial or a separate proceeding, and generally, the only courses of action open to the court are limited to the statutory grounds for review, such as to confirm the award, correct then confirm the award, vacate the award, or to dismiss the proceeding, and dismissal "may . . . be granted *only* when the court determines that the petitioner or the respondent is not bound by the arbitration award and is not a party to the arbitration" (emphasis added)).

Dealer filed no motion to vacate, modify, or correct the award, which are the prescribed statutory exceptions for avoiding confirmation of an award. We reject Dealer's assertion that payment of the award has somehow made the matter "nonjusticiable." *Confirmation* of an award is a distinguishable issue from a defendant's *payment* or satisfaction of an award.[6] Payment is more appropriately

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[6] *See, e.g., Collins v. D.R. Horton, Inc.*, 361 F. Supp. 2d 1085, 1093 (D. Ariz. 2005) ("Regardless of whether the undisputed amounts have already been paid, Plaintiffs are still entitled to an order confirming those amounts" because the confirmation statute is couched in mandatory terms and applies unless the award is modified, vacated, or corrected, and "satisfaction and confirmation are separate issues."); *Dist. Council No. 9 v. APC Painting, Inc.*, 272 F. Supp. 2d 229, 239 (S.D.N.Y. 2003) (explaining compliance and confirmation are distinct issues and

considered as a defense to any attempt to execute on a judgment. Of course, a party is always free to enter into a settlement if it wishes to avoid public knowledge of the amount paid. Having mandated arbitration in its sales agreement, however, Dealer is bound to the full arbitral process, including the ministerial recording of the result.

We find confirmation is required by the UAA's statutory procedure governing confirmation. Both the UAA and the FAA use the words "shall" or "must" in directing that an award be confirmed upon application in the absence of a motion to vacate, modify, or correct the award, and such language is mandatory. *See, e.g., Wigfall v. Tidelands Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("The term 'shall' in a statute means that the action is mandatory."); *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.").[7]

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stating whether an arbitral award has been satisfied "has no bearing" on the independent question of whether it should be confirmed); *Mikelson v. United Servs. Auto. Ass'n*, 227 P.3d 559, 563 (Haw. Ct. App. 2010) (holding an insurer's satisfaction of an arbitration award did not render an application for confirmation moot "because (1) the plain language of the applicable statute mandates confirmation of the award unless it is modified, corrected, or vacated[,] and (2) confirmation is concerned with the propriety of the award itself and is unrelated to the enforcement of the award").

[7] *See generally Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (stating the "provision for judicial confirmation carries no hint of flexibility" and the statement the court "must grant" the application "unless the award is vacated, modified, or corrected" is one "which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies"); *Qorvis Commc'ns, L.L.C. v. Wilson*, 549 F.3d 303 (4th Cir. 2008) (finding confirmation of an award is justified unless statutory grounds challenging it are established); *State ex rel. R.W. Sidley, Inc. v. Crawford*, 796 N.E.2d 929 (Ohio 2003) (stating once an arbitration is completed, a court has no jurisdiction except to confirm and enter judgment or to vacate, modify, correct, or enforce the judgment); *Ricciardi v. Travelers Ins. Co.*, 477 N.Y.S.2d 35 (App. Div. 1984) (holding an arbitrator's award had to be confirmed where the application to confirm was timely and the defendant failed to advance any statutory grounds for vacating or modifying the award, notwithstanding the fact that the defendant had already

We find Dealer's arguments as to how the confirmation and entry of a judgment here could potentially be used by other parties asserting UTPA claims is irrelevant to the award's confirmation. Despite the detailed statutory framework governing arbitration under both the FAA and the UAA, Dealer can cite to no statutory provision in either act that legislatively prohibits confirmation based on the fact that payment has been made. In the absence of a legislative directive, this Court should not judicially impose that restriction here. A court's mandate under the plain language of both acts is that confirmation "shall" or "must" be made in the absence of grounds for warranting vacating, modifying, or correcting the award. Confirmation is a ministerial act of recording the results of the arbitration.

IV. CONCLUSION

We conclude the recordation of an arbitration award is a ministerial act that is a basic part of the arbitration process, not a new judicial proceeding that would require a different justiciable issue. Confirmation is mandatory unless the opposing party has established statutory grounds to vacate, modify, or correct the award. The payment or satisfaction of an award is a distinguishable issue from its recordation, and payment does not moot a confirmation request. We further conclude the UAA's confirmation statute applies to this procedural matter in state court. Consequently, we affirm the circuit court's confirmation of the arbitration award.

AFFIRMED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

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paid the amount awarded); *Hamm v. Millennium Income Fund, L.L.C.*, 178 S.W.3d 256 (Tex. App. 2005) (stating under both the FAA and the state arbitration act, confirmation of an award is required unless a motion to vacate, modify, or correct the award has been made).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Christopher Price, Claimant,

v.

Peachtree Electrical Services, Inc. and Builders Mutual Insurance Company, Employer/Carrier, Petitioners,

v.

Bob Wire Electric, Inc., self-insured Employer, through South Carolina Home Builders Association SIF, Respondents.

Appellate Case No. 2012-207886

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27314
Submitted August 5, 2013 – Filed September 11, 2013

AFFIRMED AS MODIFIED

Richard C. Detwiler and Mary Dameron Milliken, both of Callison Tighe & Robinson, LLC, of Columbia, for Petitioner.

Kirsten Leslie Barr, of Trask & Howell, LLC, of Mt. Pleasant, for Respondent.

PER CURIAM: Peachtree Electrical Services seeks review of the Court of Appeals' decision in *Price v. Peachtree Elec. Servs., Inc.*, 396 S.C. 403, 721 S.E.2d 461 (2011), finding the Workers' Compensation Commission did not have subject matter jurisdiction over Peachtree's equitable subrogation claim. We deny the petition for a writ of certiorari as to Peachtree's Question III and affirm with regard to subject matter jurisdiction. However, we grant the petition as to Peachtree's Questions I and II, dispense with further briefing, and affirm as modified herein the decision of the Court of Appeals regarding appealability of the first appellate panel order.

Earlier in this matter, an appellate panel of the Workers' Compensation Commission issued an order finding Bob Wire Electric was responsible for an injury incurred by claimant that was originally attributed to Peachtree. The appellate panel remanded the case to the single commissioner for further determination of benefits. Bob Wire did not immediately appeal the appellate panel order, but subsequently appealed the order of the single commissioner.

Peachtree argued before the Court of Appeals that the appellate panel order was a final decision and because Bob Wire did not appeal that decision, the findings of fact and conclusions of law in the order were the law of the case. The Court of Appeals found, pursuant to S.C. Code Ann. § 14-3-330 (1976 & Supp. 2012), Bob Wire was not required to file an immediate appeal from the appellate panel order, but could wait and appeal the final judgment of the single commissioner and in fact did. The Court of Appeals applied S.C. Code Ann. § 42-17-60 (Supp. 2012) in finding section 14-3-330, the general applicability statute, controlling.

However, recently, this Court in *Bone v. U.S. Food Service*, Op. No. 27278 (S.C. Sup. Ct. filed June 26, 2013), clarified that the Administrative Procedures Act (APA), not section 14-3-330, establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Pursuant to the APA, "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review." S.C. Code Ann. § 1-23-380 (Supp. 2012). An agency decision that does not decide the merits of a contested case is not a final agency decision subject to

judicial review. *Bone*, *supra*. "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate review." S.C. Code Ann. § 1-23-380.

Accordingly, the Court of Appeals' reliance upon section 14-3-330 was in error. However, even under section 1-23-380, the order of the appellate panel was not immediately appealable. Therefore, the Court of Appeals properly found Bob Wire's failure to file an immediate appeal from the order did not render the findings of fact and conclusions of law therein the law of the case.

AFFIRM AS MODIFIED

TOAL, C.J., PLEICONES and BEATTY, JJ., concur. KITTREDGE, J., and HEARN, J., concur in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Home Builders Association of South Carolina and the Charleston-Trident Home Builders Association, Inc., Appellants,

v.

School District No. 2 of Dorchester County and the Board of Trustees for Dorchester School District No. 2, Respondents.

Appellate Case No. 2011-195208

Appeal from Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 27315
Heard February 6, 2013 – Filed September 11, 2013

REVERSED

Frederick A. Gertz and Phong Thi Van Nguyen, both of Gertz & Moore, LLP, of Columbia, for Appellants.

Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville, and Charlton De Saussure, Jr. of Haynsworth Sinkler Boyd, PA, of Charleston, for Respondents.

JUSTICE PLEICONES: This is an appeal from an order granting respondents' motion for a judgment on the pleadings under Rule 12(c), SCRCP, and dismissing appellants' complaint. Because we find issues of fact raised by the complaint that must be resolved before the constitutionality of 2009 Act No. 99 (Act) can be determined, we reverse and remand for further proceedings.

The Act permits respondent School District to impose an impact fee to be paid by developers on "new residential dwelling units constructed within the school district." Respondent Trustees adopted the impact fee by resolution effective June 23, 2009. Appellants, each an organization of home builders, brought this declaratory judgment suit seeking injunctive relief against respondents challenging the constitutionality of the Act under provisions of the state constitution requiring statewide uniformity (S.C. Const. art. VIII, § 14(6))[1] and limiting special legislation (S.C. Const. art. III, § 34).

Respondents moved for a judgment on the pleadings under Rule 12(c). A judgment on the pleadings shall be granted "where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009) citing *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). A judgment on the pleadings is "a drastic procedure." *Russell*, *supra*, cited in *Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000). The circuit judge granted the motion.[2]

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[1] Appellants do not rely on this ground on appeal.

[2] In fact, the court went further and actually declared the Act constitutional. The dissent falls prey to this same error, and in so doing far exceeds the scope of the matter before us. Among other things, the dissent recaps two publications primarily authored by Professor Ulbrich, cites other school district legislation, and improperly cites to York County ordinances. *See Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000) (reiterating well-settled rule that appellate court cannot take judicial notice of local ordinance). In its zeal to reach the merits of the Act, the dissent writes extensively on matters which are not in dispute, including the General Assembly's authority and responsibility to enact special legislation to benefit public education. In so doing, the dissent loses sight of the sole issue before the Court in this appeal: does the complaint raise any issue of fact

South Carolina Const. art. III, § 34(IX), provides that "where a general law can be made applicable, no special law shall be enacted." Legislation regarding education is not exempt from this requirement even though art. XI, § 3, gives the General Assembly more discretion with respect to legislation impacting a school district than it has in other areas. *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 558, 713 S.E.2d 604, 607-608 (2011) (internal citation omitted). *Charleston County* holds that a constitutional challenge predicated on a special legislation claim is analogous to one based upon equal protection. Special legislation is not unconstitutional if there is "a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded . . . . In other words, the General Assembly must have a logical basis and a sound reason for resorting to special legislation." *Horry County v. Horry County Higher Educ. Comm'n*, 306 S.C. 416, 419, 412 S.E.2d 421, 423 (1991) (citations omitted) cited with approval in *Charleston County*, 393 S.C. at 558-559, 713 S.E.2d at 608.

The Act itself is silent on any unique or special funding needs of respondent School District.[3] Further, the complaint alleges the Act applies only to respondent School District, and that the district's funding needs are no different from many other districts in the state, that it does not have unique funding requirements, and that other similarly situated school districts are faced with the same issues. It specifically alleges:

> The Act's application to a single school district without any peculiar or unique conditions, resulting in special treatment, violates the provisions of the South Carolina Constitution, in particular art. III, § 34 (limiting "special legislation") and art. VIII, § 14(6) (requiring statewide uniformity).

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which, if resolved in appellants' favor, would entitle them to a judgment. Neither the wisdom nor the constitutionality of the 2009 Act is at issue at this juncture.

[3] The order finds the impact fee warranted by "The public education improvements necessitated by rapid population growth . . . ." This finding is taken from the resolution, however, not the Act, and thus does not represent a basis or reason for the legislature to have resorted to the Act. *Charleston County*, *supra*.

The complaint thus alleges facts which, if proven, would render the Act unconstitutional special legislation.

The circuit court and respondents rely on a single sentence found in *Bradley v. Cherokee School Dist. No. One*, 322 S.C. 181, 470 S.E.2d 570 (1996): "A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34(IX)." Here, we are concerned with an impact fee, not a tax, and one that is placed on only some persons and not others.[4] Moreover, since *Bradley* was decided, we have clarified that all challenges to education-related special legislation are subject to the test set forth in *Kizer v. Clark*, 360 S.C. 86, 600 S.E.2d 529 (2004). *Charleston County, supra*.

We find the complaint alleges facts which, if resolved in appellants' favor, would result in a declaration that the Act is unconstitutional. The order granting respondents' Rule 12(c) motion is therefore

REVERSED.

BEATTY and HEARN, JJ., concur. KITTREDGE, J., concurring in result only. TOAL, C.J., dissenting in a separate opinion.

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[4] We now overrule *Bradley* to the extent it relies upon *Hay v. Leonard*, 212 S.C. 81, 46 S.E.2d 653 (1948). *Hay*, like *McElveen v. Stokes*, 240 S.C. 1, 124 S.E.2d 592 (1962) and the other pre-1973 cases relied upon by the dissent, were decided under the pre-Home Rule state constitution. Prior to 1973, article XI of the constitution contained the education-related provisions. Article XI, § 6 provided in its last sentence "Any school district may by the authority of the General Assembly levy an additional tax for the support of schools." In other words, at the time *Hay* was decided, it was impossible for a school district tax act to constitute an unlawful special law under art. III, § 34(IX) in light of the specific authorization of art. XI, § 6. This article was repealed by 1973 Act No. 42, and § 6 was not reenacted elsewhere in the post-Home Rule constitution. *Bradley* erred in relying on *Hay*, decided under the pre-1973 version of S.C. Const. art. XI, § 6, and the dissent would perpetuate this error.

CHIEF JUSTICE TOAL: Respectfully, I dissent. I would affirm the circuit court's grant of respondents' motion for a judgment on the pleadings under Rule 12(c), SCRCP, because, in my assessment, appellants' complaint does not raise an issue of fact that would entitle appellants to judgment if resolved in their favor. The majority finds appellants' allegation that respondent School District does not have unique funding needs, if proven, would render the Act unconstitutional special legislation. In doing so, it is my opinion the majority improperly applies the constitutional prohibition of special legislation to education-related legislation.

Article III, section 34(IX) of the South Carolina Constitution prohibits the General Assembly from enacting local laws "where a general law can be made applicable." S.C. Const. art. III, § 34(IX). However, "special legislation is not unconstitutional where there is 'a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded.'" *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 558–59, 713 S.E.2d 604, 608 (2011) (quoting *Horry Cnty. v. Horry Cnty. Higher Educ. Comm'n*, 306 S.C. 416, 419, 412 S.E.2d 421, 423 (1991)). Thus, "the General Assembly must have a logical basis and sound reason for resorting to special legislation." *Id.* The purpose of restricting local or special legislation is to promote uniformity in state laws where possible, and to avoid duplicative or conflicting laws on the same subject. *Med. Soc'y of S.C. v. MUSC*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999).

This Court is deferential to the General Assembly when determining the constitutionality of a local law and will not declare it unconstitutional "unless its repugnance to the Constitution is clear beyond a reasonable doubt" or "there has been a clear and palpable abuse of legislative discretion." *Id.* at 279, 513 S.E.2d at 357; *Sirrine v. State*, 132 S.C. 241, 248, 128 S.E. 172, 174 (1925), *overruled on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). Even greater deference is given when evaluating local laws related to school matters. *See McElveen v. Stokes*, 240 S.C. 1, 10, 124 S.E.2d 592, 596 (1962). The Court has explained that in evaluating local

legislation involving public education, the constitutional restrictions on special legislation must be viewed in light of the General Assembly's Article XI duty to "provide for the maintenance and support of a system of free public schools open to all children in the State." S.C. Const. art. XI, § 3; *McElveen*, 240 S.C. at 10, 124 S.E.2d at 596. These cases and constitutional provisions make clear the scope of legislative power is broader on the topic of schools, and consequently, this Court has traditionally sustained local laws related to the state's public education system. *See Bradley v. Cherokee Sch. Dist.*, 322 S.C. 181, 470 S.E.2d 570 (1996); *Smythe v. Stroman*, 251 S.C. 277, 162 S.E.2d 168 (1968); *Moseley v. Welch*, 209 S.C. 19, 39 S.E.2d 133 (1946); *Walker v. Bennett*, 125 S.C. 389, 118 S.E. 779 (1923).

By passing the Act allowing respondent School District to impose an impact fee, the General Assembly signaled its belief that conditions present in Dorchester County's School District Number Two made it necessary to impose an impact fee to support its public education system. That is, the General Assembly opined that in order to fulfill its Article XI duty to provide for the "maintenance and support of a system of free public schools," an impact fee was necessary to offset the additional demand for public facilities created by new developments in Dorchester County. *See* S.C. Const. art. XI, § 3; *McElveen*, 240 S.C. at 10, 124 S.E.2d at 596. We have always provided great deference to the General Assembly in making these decisions, and the same respect should be afforded here.

In footnote two, the majority opines "the dissent loses sight of the sole issue before the Court in this appeal: does the complaint raise any issue of fact which, if resolved in appellants' favor, would entitle them to a judgment." The majority finds appellants' allegation that respondent School District is without unique funding needs, if proven, would entitle them to relief. However, in *Bradley*, this Court stated, "A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34(IX). Individual districts may impose a legal tax limited in application and incidence to persons or property within the

prescribed area." *Bradley*, 322 S.C. at 186, 470 S.E.2d at 572 (internal citations omitted); *see also Moye v. Caughman*, 265 S.C. 140, 144, 217 S.E.2d 36, 38 (1975) (noting that although the appellant did not raise the issue in his brief, "[s]ection 34 does not deal with matters specifically covered by Article XI") (citing *Thorne v. Seabrook*, 264 S.C. 503, 216 S.E.2d 177 (1975); *McElveen*, 240 S.C. 1, 124 S.E.2d 592; *State v. Huntley*, 167 S.C. 476, 166 S.E. 637 (1932)). Notably, *Bradley* did not condition its holding on a school district having "unique or special funding needs"; rather, *Bradley* simply stated a tax that applies only to persons or property in a single school district is constitutional special legislation.

Accordingly, appellants' allegation that respondent School District is without unique funding needs, even if true, would not entitle them to judgment. *See* Rule 12(c), SCRCP. Therefore, under *Bradley*, the circuit court's grant of respondents' Rule 12(c) motion was proper, as is an analysis of the Act's constitutionality at this stage of the litigation. The majority properly notes the case at hand is different from *Bradley* in that we are evaluating the propriety of an impact fee rather than a tax; however, I find no reason why the impact fee should be treated differently. Subdivisions of local authority, including school districts, have the ability to raise funds, which should include the utilization of an impact fee.[5]

The majority now takes the view that *Bradley* should be overruled to the extent it relies on *Hay v. Leonard*, 212 S.C. 81, 46 S.E.2d 653 (1948), because at the time *Hay* was issued, Article XI, section 6 expressly provided school districts with the power to levy an additional tax for the support of schools. However, while Article XI, section 6 was subsequently repealed, school districts continue to have taxing power under South Carolina's Constitution. For example, Article X, section 6 states, "Except as otherwise

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[5] York County currently imposes a school impact fee. York, S.C., Code §§ 153.75–82 (1996); *see also In re Nov. 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637 n.3, 686 S.E.2d 683, 686 n.3 (2009) (stating the principle of law that courts will not take judicial notice of a municipal ordinance does not apply where the cited ordinance is not dispositive of the outcome of the case).

provided in this section, the General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including . . . school districts." S.C. Const. art. X, § 6. Further, Article X, section 7(b) directs school districts to prepare and maintain annual budgets, and in the event a district's expenses exceed its projected income, *requires* the school district to "provide for levying a tax in the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year together with the estimated expenses for such ensuing year." S.C. Const. art. X, § 7(b).

These constitutional provisions align with South Carolina's history of allowing the General Assembly to take an individualized approach to the manner in which school districts are funded and operate. For example, in 2004, the General Assembly passed legislation allowing Lexington County school districts to impose a penny tax, Lexington County School District Property Tax Relief Act, Act No. 378, 2004 S.C. Acts 3142, and in 2011 renewed this legislation for an additional seven years. The General Assembly also enacted legislation in 2010, over the Governor's veto, tailored to the fiscal operations of Fairfield County schools. Act No. 308, 2010 S.C. Acts 2845 (adding legislative appointees to the Fairfield County School Board and transferring fiscal authority to a financial council appointed by the legislative delegation).

Because each school district is unique and faces its own distinct challenges, it is important that the General Assembly retain its ability to legislate, when necessary, on an individualized basis. Eighty-five school districts provide education services in this State. Holley H. Ulbrich et al., *Local Governments and Home Rule in South Carolina* 8 (2011). Prior to the 1950s, South Carolina had more than 1,200 school districts, but in recent years, many of those districts have consolidated.[6] *Id.* Some counties maintain a single countywide school district, while others are comprised of

[6] Recent consolidations have occurred in, among others, Marion, Orangeburg, and Sumter Counties. *Id.*

multiple districts, ranging from two to seven in number. *Id.* Further, several school districts serve small parts of neighboring counties. *Id.*

Unsurprisingly, South Carolina's eighty-five districts vary in size and population, which affects operating costs per student. Holley H. Ulbrich, *School District Organization and Governance in South Carolina* 9 (2010). National studies have shown operating costs per pupil can dramatically decrease when small districts consolidate, while savings may dwindle with larger consolidating districts. *Id.* Instructional costs vary based on the number of students per classroom, and a district's geographic size greatly affects its transportation costs. *Id.* at 11. In 2005, the General Assembly created a temporary committee to study the sizes and costs of South Carolina's school districts. *Id.* at 12. The study revealed significant differences in spending per pupil between the twenty smallest and twenty largest districts—an estimated average difference of $277 per student. *Id.*

Moreover, fiscal authority amongst South Carolina's various school districts ranges from complete fiscal authority to no fiscal authority whatsoever. Ulbrich, *Local Governments and Home Rule in South Carolina* 13. Twenty-three districts have total fiscal independence to approve their own budgets and set their own millage rates, while twenty-nine districts have no fiscal authority. *Id.* at 13–14. Further, the power to raise millage rates varies greatly from one school district to another, depending on the local legislation that governs school districts in that particular county. *Id.*

With these considerations in mind, South Carolina has historically taken an individualized approach regarding school-related legislation. Our districts vary in size, population, functionality, and most important to the issue at hand, operating costs. Moreover, with district lines being constantly redrawn through local legislation, our districts will inevitably continue to evolve. If the General Assembly is to fulfill its Article XI duty to maintain and support a free public school system for all children, we must continue to provide the level of deference necessary to legislate based on the evolving needs and unique capacities of each school district. *See* S.C. Const. art. XI, § 3; *Bradley*, 322 S.C. at 186, 470 S.E.2d at 572; *McElveen*, 240 S.C. at 10,

124 S.E.2d at 596. *Bradley* recognizes this principle and, in my view, should not be overruled. The majority's departure from *Bradley* will have detrimental effects on the operations and funding of our school districts.

Therefore, I would find the Act is sustainable under Article III, section 34(IX) as constitutional special legislation. Accordingly, I would affirm the circuit court's grant of respondents' Rule 12(c), SCRCP, motion for a judgment on the pleadings because appellants assertion that respondent School District is without unique funding needs would not entitle appellants to judgment. *See Bradley*, 322 S.C. at 186, 470 S.E.2d at 572 ("A law that is special only in the sense that it imposes a lawful tax limited in application and incidence to persons or property within a certain school district does not contravene the provisions of Article III, § 34(IX).").

The Supreme Court of South Carolina

In the Matter of Charles Wade Cleveland, Respondent.

Appellate Case No. 2007-067339

ORDER

On September 10, 2007, respondent was placed on interim suspension. *In the Matter of Cleveland*, 375 S.C. 142, 651 S.E.2d 331 (2007). Respondent has filed a Petition to Terminate Interim Suspension. The Office of Disciplinary Counsel does not oppose the request.

We hereby lift the interim suspension. Respondent may be reinstated as a regular member in good standing of the South Carolina Bar upon showing he has paid the necessary license fees and met the applicable continuing legal education requirements. *See* Rule 410(p), SCACR (An attorney seeking to return to good standing must, in addition to any other requirement of reinstatement, pay the license fees for the year in which the attorney desires to be reinstated if the fees have not already been paid for that year.).

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
September 3, 2013