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**Mar 21 2024**

**SC Court of Appeals**

Case No. 2023-001733

**In**

**The State of South Carolina**  
**The Court of Appeals**

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**Jian-yun (John) Dong, M.D., Ph.D., Appellant**

**v.**

**The Medical University of South Carolina, Respondent**

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**Appeal From Charleston County Court of Common Pleas**  
**The Honorable Jean Toal, District Court Judge**  
**Trial Court Case No. 2016-CP-10-06683**

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**OPEN BRIEF OF THE APPELLANT**

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## **STATEMENT OF ISSUES PRESERVED FOR REVIEW**

- I. Did the district court err in granting Defendant's motion for summary judgment when Defendant failed its burden to prove the lack of genuine issues?
- II. Is violation of due process a reversible error, in which the district court restricted the Appellant's discovery to practically nonexistent and granted the summary judgment before Appellant could conduct a discovery?

## **STATEMENT OF CASE**

This appeal arises from a Summary Judgment issued by the District Court in a civil case filed by Jianyun (John) Dong, M.D., Ph.D. (Dr. Dong, Appellant) against his employer, the Medical University of South Carolina (MUSC, Respondent), alleging the Respondent breached a contract in bad faith, illegally seized Dr. Dong's research assets, terminated Dr. Dong tenured professorship, employment benefits, and caused irreparable damages to the Appellant's career and financial well-being.

The case was initially filed in 2014 and reinstated in 2016 with Case Number 2016-CP-10-06683. The discovery phase of the case was problematic and plagued with extensive delays caused by the Respondent's stonewalling tactics, refusals for production and deposition, and the court's stays during the pandemic. Furthermore, the District Court granted the Respondent's motions to restrict the discovery to only

a set of email communications “directly to or from Dr. Dong and Dr. Lanier no earlier than 2010” and a short timeline for Dr. Dong to take depositions of his witnesses before the depository motion phase. (App. 210-211, a-b) At the same time, the District Court denied Dr. Dong’s motions to compel, to expand the scope of the discovery, and for a protection order due to his illness and surgeries, and motions for reconsideration. As a result, the District Court granted the Respondent’s Motion for Summary Judgment without allowing Dr. Dong to obtain relevant documents and take any witnesses’ deposition.

Following issuing the Order granting summary judgment on July 17, 2023, Dr. Dong filed a motion to alter or amend the order granting summary judgment on July 28. (App. 238) The Respondent filed a response on August 16. (App. 156) District Court denied the motion on September 22 for untimely (which is erroneous based on the filing dates) and meritless for “[failing] the burden of proof.” (App.131) On September 28, Dr. Dong filed a motion for recusal based on the appearance of bias, which the district court denied on October 4. Dr. Dong filed his Notice of Appeal on November 27, 2023.

## **STATEMENT OF FACTS**

### **A. THE BACKGROUND**

Appellant John Dong, M.D, Ph.D., was a tenured full professor at the Medical University of South Carolina. Dr. Dong was recruited by MUSC from The

University of California, San Francisco, in 1998. As part of his recruitment, Dr. Dong was requested to contribute to MUSC's efforts in establishing biotechnology industries under the mandate of the State of South Carolina to support high-paid jobs.

In about 2008, Dr. Dong found out that the Department Chairman, Dr. James Norris, had been covertly converting Dr. Dong's research projects, funds, and laboratory equipment for Dr. Norris' use while holding Dr. Dong's promotion and salary to coerce Dr. Dong not to raise the issues to the MUSC administration. However, Dr. Norris made false claims against Dr. Dong to the MUSC administration and various committees, claiming biosafety violations because Dr. Dong developed vaccines against lethal infection agents for the National Institute of AIDS and Infectious Diseases and the Department of Defense.

In or about 2009, with the help of Dr. Norris' friend, the Vice President of Research, Stephen Lanier, Dr. Norris blatantly took over all of Dr. Dong's biological research materials under the falsehood of "biosafety auditing" and eventually took all Dr. Dong's research materials, technologies, equipment, and documentations by locking up Dr. Dong's laboratories and office, and completely blocked Dr. Dong's ability to teach, research, and advance his academic career.

Dr. Dong made complaints to the Administration of MUSC to resolve the illegal takeover and violations of Dr. Dong's faculty rights. However, Dr. Lanier was the vice president of research and was in charge of academic affairs related to

research and teaching. He was the very person who conspired with James Norris to take over Dr. Dong's research operations. After nearly a year of struggling with Lanier's stonewalling, Dr. Dong could not get back his research materials and was continuously blocked from his research and teaching operations. Time was critical in his research, competing for grant funding, and advancing his career.

## **B. THE AGREEMENT**

Finally, in or around April 2010, Dr. Lanier proposed "a temperate solution" through the Dean of Medical College and Vice President for Medical Affairs, Dr. Jerry G. Reves. Dr. Reves proposed to have an eighteen-month "cooling period" by separating Dr. Dong's research operations from those of Dr. Norris and allowing Dr. Dong to continue his research off campus at a company established by the MUSC's Foundation for Research and Development, and to continue the rest of his academic activities at MUSC under the Chairman of the Department of Biochemistry, Dr. Yusuf Hannun. Dr. Reves explained that at the end of the "separation," MUSC would evaluate Dr. Dong's performance and allow him to return, especially when he could get more grants for MUSC. Alternatively, if Dr. Dong obtains a position at another university, he would resign from MUSC. These clauses were stated in the detailed terms of the Agreement. (App. 236)

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Two of the essential components of the Agreement are:

(1) returning all Dr. Dong's research materials and equipment, which are his properties, to Dr. Dong and transferring these assets to a laboratory at the Company;

(2) giving Dr. Dong the full access to MUSC facilities on campus to conduct his academic activities as a tenured full professor. (App. 236-237) A partial list of Dr. Dong's assets was attached with the Agreement. (App. 240)

The Agreement was drafted by MUSC's general counsel, Mr. Joe Good. After several revisions, Dr. Dong was informed to sign the "final version of the agreement," with all the changes and terms that had been discussed, on May 3, 2010. Out of deep respect and trust for Dr. Reves, Dr. Dong did not scrutinize the "legal wording or style" utilized by Mr. Good, which was explained to him as "saying the same thing" and signed the "Final Separation Agreement" as he was explained and understood: "the final version of the temperate separation agreement" for the cooling period.<sup>1</sup>

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<sup>1.</sup> This notion is important because, at the motion for summary judgment hearing, the defendant's attorney claimed that the Agreement was actually a "final severance agreement," without any witness testimony or affidavit. The defendant's attorney wanted to lead the court to believe Dr. Dong agreed to resign from the University without material condition. First, this claim proved that MUSC was in bad faith and had no intention to honor it. Second, the claim is false because MUSC's General Counsel clearly understood the differences in the legal definitions of "separation" and "severance." Here, separation meant separating the two disputing faculty members by transferring Dr. Dong's operation to an off-campus location in order for him to continue his research work on behalf of the University, with the terms detailed in the Agreement. At the end of the separation period, resignation was one of the two options; only when Dr. Dong chose to obtain a professorship at a different university. (App. 236, pp4)

### **C. THE BREACH OF CONTRACT**

As the vice president for research, Dr. Lanier was in charge of implementing the Agreement. However, during the eighteen months following the signing of the Agreement, Dr. Lanier did not transfer any of Dr. Dong's research assets to the off-campus location but continuously blocked Dr. Dong's academic activity at MUSC. Dr. Lanier further supported Dr. James Norris and other faculties to take over Dr. Dong's research projects, and to continue the use of Dr. Dong's research materials and technologies to obtain research grants, publish research results, and enrich Dr. Norris, Dr. Lanier, and MUSC at the expense of devastating Dr. Dong's career and livelihood.

In contrast, Dr. Lanier implemented numerous activities that were detrimental to Dr. Dong's career. These included but were not limited to:

- (1) Did not transfer or return Dr. Dong's research materials, essential documents, and equipment, which are essential for Dr. Dong to continue his research and advance his career;
- (2) Withheld Dr. Dong's multiple intellectual properties;
- (3) Continually blocked from any academic activities at MUSC;
- (4) Rejected a \$3,500,000 Dengue vaccine grant that Dr. Dong obtained from the National Institutes of Health on behalf of MUSC, causing Dr. Dong to lose his salary and funds for research provided in the grant.
- (5) Terminated his tenure at the University;
- (6) Terminated his salary and benefits, including his and his family's health benefits;

- (7) Terminated his retirement pensions;
- (8) Assisted and participated in a hostile takeover by one of the Company's investors who laid all the legal liability of the Company's using federal contract funds for a research facility on Dr. Dong and made him suffer all the legal consequences for the Company while the investors cashed out and abandoned the Company.

As a result of this breach of contract, Dr. Dong's stellar career and entire financial well-being were destroyed, and the damages were irreparable.

#### **D. THE CASE**

Dr. Dong filed his Complaint on September 2, 2014, in the Court of Common Pleas in Charleston County (district court), alleging breach of contract, bad faith dealing, and illegally seizing Dr. Dong's research material, equipment, technologies, protocols, and records, abolishing Dr. Dong's tenure, and violated Dr. Dong's faculty rights and caused severe damage to Dr. Dong's career and livelihood.

The Case was suspended when the MUSC's general counsel, Mr. Joe Good, resigned, and Dr. Dong's attorney, Mr. Allan Homes, applied for the position. The Case was reinstated by the district court in 2016 at the request of Dr. Dong after MUSC hired a new General Counsel.

#### **E. THE COURT PROCEEDINGS**

Subsequently, MUSC proceeded with discovery, including its First Interrogatory and Request for Production, in late 2018. Dr. Dong submitted a timely Response to MUSC's satisfaction and filed his First Request for Production. (App.

183, 186) However, MUSC refused to produce any information or document requested by answering each question as “too broad and ambiguous.” Dr. Dong file an Objection. (App. App. 201) In March 2019, Dr. Dong filed the First Motion to Compel. The Motion to Compel was subsequently heard by the Honorable D. Craig Brown. As a result of the hearing, Judge Brown issued an Order on June 20, 2019, GRANTING the First Motion to Compel. (App. 206)

On July 3, 2019, MUSC filed a Motion to Alter or Amend as to Judge Brown’s June 20, 2019, Order. Thereafter, Judge Brown held a hearing where MUSC did not present a legal basis but claimed logistic or practical reasons for MUSC’s inability to provide the requested information. However, MUSC stated it is ready to produce some information if the First Request for Information is limited to communications “directly to or from Dr. Dong and Dr. Lanier no earlier than 2010.” At the hearing, MUSC also told Judge Brown that the information was “extensive, about 500 pages,” and could be produced immediately. Judge Brown agreed and issued an Order on October 4, 2019, requesting MUSC to produce the limited information within ten days, and specifically ordered that the time and scope of the discovery “may be expanded at any time by either party.” (App. 210-211, a. - b.)

Under Judge Brown’s order, MUSC provided a stack of printed emails, most of which are repeats of the same email chains without page numbers or dates. This email dump did not conform with discovery rules that require the responding party

“shall produce them as they are kept in the usual course business or shall organize and label them to correspond with the categories in the request.” See SCRCPP, Rule 34(b). Evaluating the content or authenticity of the printed materials was nearly impossible.

Per Judge Brown’s Order, Dr. Dong filed a Motion to Expand Discovery in time and scope on January 29, 2020 (App. 215) and served MUSC with the Second Request for Production. Again, MUSC refused to produce any information by claiming each question was “too broad and ambiguous” or “the same as the First Request for Production,” which were never answered.

In February or March 2020, Judge Brown Stayed the forgoing Case because of the ongoing COVID-19 pandemic, and the South Carolina Supreme Court issued an initial memorandum to close or alter the operations of certain circuit courts in South Carolina.

Not knowing the Case was stayed, Dr. Dong filed the Second Motion to Expand the time and scope of Discovery on January 11, 2021. The motion was met with no response. Finally, on January 20, 2021, Dr. Dong filed the Second Motion to Compel Production.

MUSC failed to respond to Dr Dong’s Motions for nine months, which legally left these Motions unopposed.

Dr. Dong filed a Motion for Granting Un-contested Motions on September 22, 2021.

Subsequently, MUSC filed a Motion for a Status Hearing, blaming its nonresponse to Dr. Dong's Motions to Expand Discovery on a "clerical error" of the court, which made the appearance that the Case remaining stayed.

On October 5, 2021, at the request of MUSC, the district court lifted the stay and allowed MUSC to file a Response to Dr. Dong's Motions to Expand Discovery and Second Motion to Compel.

On December 13, 2021, the district court commissioned Magistrate Judge Cothran to conduct a hearing on Dr. Dong's pending motions. At the hearing, Magistrate Cothran indicated that Dr. Dong's Motions to Expand Time is "granted" but suggested that Dr. Dong continue the discovery by taking depositions and "may request additional documents based on the information obtained through the deposition."

However, on January 10, 2022, Magistrate Cothran's clerk emailed MUSC's counsel, "Judge Cothran DENIED all Plaintiff's discovery motions and requested the counsel to submit a proposed order."

On January 20, 2022, MUSC submitted the "proposed order," which permanently restricted the discovery by Plaintiff to only the emails Dr. Dong received from Dr. Lanier during 2010 and allowed MUSC to dictate the timeline.

On February 3, 2022, Dr. Dong filed his “Opposition to the proposed order.”

On February 7, 2022, Magistrate Cothran signed the MUSC-proposed order word by word over Dr. Dong’s objections. (App. 220)

Dr. Dong timely filed an interlocutory appeal based on that the unreasonable restriction on discovery violated due process, and the harm to Dr. Dong would be irreparable after a trial, pursuing Federal Civil Procedures §1292.

This Court remitted the appeal to the district court because the judgment was not final and reassigned the Case to the retired Justice, Honorable Jean Toal, as the district judge.

On October 4, 2022, Judge Toal held a status conference. At the hearing, the Judge accepted a schedule proposed by the Respondent’s attorney over Dr. Dong’s objection and asked the attorney to submit a proposed order. On October 7, the Judge issued the Scheduling Order, which set a short timeline for the discovery before filing dispositive motions. The Order specifically removed the mediation process and set a firm time for taking Dr. Dong’s deposition. In contrast, the Order only allowed Dr. Dong to take the deposition of MUSC’s employees when they were “willing and available.”

With the Order’s short timeline for dispositive motions, the Respondent continued its stonewalling tactics, using a variety of trivial or logistic reasons to delay and hamper Dr. Dong’s discovery. For example, the Respondent’s attorney

stopped his deposition of Dr. Dong when Dr. Dong asked if he could record the deposition with his iPhone for personal use while the deposition was recorded and transcribed by the court reporter.<sup>2</sup> Even when Dr. Dong agreed not to use his iPhone, the Respondent's attorney insisted on postponing the deposition "to seek the court's intervention," for which it took the Judge weeks to respond. When it was Dr. Dong to take depositions of his witnesses, the Respondent's attorney delayed the process for weeks each time because he "needed to coordinate with MUSC's general counsel and the witnesses to find out when they are "willing and available." Finally, the attorney refused to produce any of the key witnesses by claiming MUSC lost contact with them after their retirement, even though they all were receiving pensions and benefits from MUSC.

At the same time, the court held firm the deadlines over Dr. Dong's interests in taking deposition of his witnesses. The district court denied all of Dr. Dong's motions for a protective order, including for a protection order, because a proceeding in a superior court (January 4, 2023), a renewed motion for a proactive Order (January 31, 2023), and a Motions for extension of time for discovery (March 1, 2023). The court denied Dr. Dong's Motions not based on the "good cause standard" or the right for discovery but because "the motions conflict with the Scheduling

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<sup>2.</sup> The rules for deposition state the recording and transcription must be done by a certified court reporter for courtroom use. However, there is no language prohibiting the use of iPhone recordings by the person being deposed for his reference.

Order.” In contrast, the court granted all Respondent’s motions for protective orders because the two Respondent’s attorneys wanted to take consecutive vacations, even though only one attorney would be needed for the deposition. These protective orders took up the remainder of the time for Dr. Dong to take the deposition.

On the day the depository motion may be submitted, March 31, 2023, the Respondent submitted its Motion for Summary Judgment. The court gave Dr. Dong 10 days to submit his response before a hearing scheduled ten days later, which was the minimal amount of time required by statute. Dr. Dong filed a motion for an extension to file a response to the defendant’s motion for summary judgment because Dr. Dong is a layman representing himself and needs extra time to study and prepare for the response. The court denied the motion by email without a reason.

On April 4, Dr. Dong filed a hastily prepared Response in Opposition to the defendant’s motion for summary judgment but was not able to submit a memorandum in support of the opposition, which was submitted later by mail on June 25. (App. 45; 49)

On May 1, Dr. Dong submitted a motion for a protective order due to scheduled eye surgeries and recovery time, supported by medical records showing the scheduling and pre-surgery examinations and tests predated the Summary Judgment and the hearing notice. The Judge denied the Motion with an email stating, “It is not the right way to request an extension of time.”

On May 26, Dr. Dong filed a motion for continuance of the hearing on Summary Judgment because, in addition to the eye surgeries, Dr. Dong would need more time to prepare for the hearing under this Court and the Supreme Court's rulings that "pro se litigant" should be given "leeway" in filing and review standard (citation omitted). The court denied the motion by email without stating a reason.

On June 15, Dr. Dong filed a motion for equal time court filings, requesting the court at least give Dr. Dong the time equal to those given to the attorneys. On June 20, the court "granted" the motion by affirming the hearing date on June 26, one day after the requested protection time due to eye surgeries, leaving no time for Dr. Dong to prepare for the hearing.

On June 27, Dr. Dong filed a motion for rehearing and the Memorandum in support of his opposition. On July 7, 2023, the Judge denied the motion and issued the Order Granting Motion for Summary Judgment.

On July 28, 2023, Dr. Dong filed a Motion for Amendment of Order granting summary judgment. The Judge denied the Motion on September 22, 2023, before Dr. Dong could file his Reply to Respondent's opposition. (App.131)

On September 28, 2023, Dr. Dong filed a motion for recusal based on the appearance of bias. The Judge denied the Motion on October 4, 2023.

On November 27, Dr. Dong filed the Notice of Appeal to the Order Granting Defendant's Motion for Summary Judgment.

## ARGUMENT

### **I. The district court erred in granting Defendant's motion for summary judgment when Defendant failed its burden to prove the lack of genuine issues.**

#### **STANDARD OF REVIEW**

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC." *Id.* (quoting *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)).

Rule 56, SCRPC provides:

(c) The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (emphasis added)

Under the law, our Supreme Court has established:

"Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008).

"If triable issues exist, those issues must go to the jury." *Mulherin-Howell v. Cobb*, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005).

The Supreme Court has further addressed the initial burden the moving party carries to succeed on a summary judgment motion:

“A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.”

*Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) (citations omitted). *Beneficial v. Windham*, App. Case No: 2017-001954

**A. There Are Genuine Issues of Fact Requiring a Trial.**

In the current case, the District Court erred in granting the Defendant’s motion for summary judgment when there are multiple issues of material fact that must be determined by trial under the law.

The undisputed factual issues, as admitted by the Defendant, are:

1. The Defendant did not transfer to Dr. Dong any of his research equipment, biological reagents, scientific results, and documents, which had been taken from Dr. Dong illegally, as specified in the contract.

2. It caused damage to Dr. Dong by the failure of transfer of Dr. Dong’s equipment, research materials, protocols, and technologies, which were essential for

him to continue his research career at the new location and obtain an equivalent or better position at another university, including his tenured professorship.

3. Damages to Dr. Dong by allowing the department chairman, James S. Norris, to continue using Dr. Dong's equipment and technologies to obtain grant funds, advance his career, and to enrich himself and the University at the expense of destroying Dr. Dong's career and financial well-being.

4. In addition to the material value of Dr. Dong's research assets, the intangible value of these assets and the financial damages to Dr. Dong by depriving Dr. Dong of his research assets must be determined.

Court Records show that Dr. Dong asserted these factual issues in his answers to Defendant's First interrogatory (App. 186), the Memorandum supporting his opposition to the Defendant's Motion for Summary judgment (App. 49), his affidavit (App. 71), and his deposition (App. 83), as well as the hearing of Respondent's motion for summary judgement (App. 244). Therefore, the issues are preserved for the Court's review.

The Defendant did not dispute these facts. Nor did the Defendant ever raise an opposition to Dr. Dong's contention that these factual issues require a trial. Defendant simply did not present any evidence – not a single its witness, affidavit, testimony, or document – to prove the lack of these issues of material fact.

Therefore, the District Court erred in granting the Defendant's motion for summary judgment where there are numerous issues of facts, "those issues must go to the jury." *Mulherin-Howell v. Cobb, id.*

Furthermore, "Summary judgment is inappropriate 'even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusion drawn from those facts. All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant.' *Clyburn v. Sumter Co. Sch. Dist. 17*, 311 S.C. 521, 522-523, 429 S.E.2d 862, 863 (Ct. App. 1993) (citations omitted)" *Lanham v. Blue Cross*, 338 S.C. 343, 526 S.E.2d 253 (Ct.App. 2000)

**B. The Defendant Failed its Burden of Proving The Lack of Genuine Issues of Material Facts As Required By Law.**

The District Court erred in granting the Defendant's motion for summary judgment when the Defendant failed its burden of proving the lack of genuine issue.

The Supreme Court commanded:

"A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment." *Standard Fire Ins. Co. id.*

Contrary to the law, Defendant failed to present any evidence required by the law, “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,” to support his motion for summary judgment. The Defendant also gave no argument or evidence to contradict the issues of material fact as stated above in section A.

Instead, Defendant raised two issues to support its motion for summary judgment, both of which were questions of material fact: (1) “Plaintiff’s sole cause of action for breach of contract is barred by the applicable, three-year statute of limitations” and (2) “Plaintiff cannot present sufficient evidence MUSC breached a separation agreement ... or incur any damages if Plaintiff could present sufficient evidence of breach.” See Defendant’s Motion for Summary Judgment, App.27).

None of these issues serves as the basis for a summary judgment. When and if a contract is breached or if the evidence presented is sufficient to show the breach or the magnitude of damages caused by the breach are questions of material fact that must be decided by a trial. See Rule 56(d). The Supreme Court has commanded: “If triable issues exist, those issues must go to the jury.” *Mulherin-Howell v. Cobb*, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005).

Furthermore, Defendant provided no evidence to support its issues. The Defendant did not produce any witness, affidavit, or document to show that the

breach occurred three years before the Complaint was filed, or the contract was fully implemented so there was no breach. Defendant only attached the Separation Agreement filed by Dr. Dong and Dr. Dong's deposition transcript but failed to explain how the Agreement or any part of Dr. Dong's testimony supports the Defendant's argument.<sup>3</sup>

The Court has long established:

“On a motion for summary judgment, the moving party carries the burden of proof *even when the nonmoving party does not submit any evidence in opposition.*” *Beneficial v. Windham*, 431 S.C. 256, 267 (2020) (emphasis added)

Here, the Defendant as “[the] party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to [Dr. Dong,] the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment *even though his adversary does not come forward with opposing materials.* *Standard Fire Ins. Co.*, 301 S.C. at 422, 392 S.E.2d at 462 (emphasis added) (citations omitted).” *id.* at 267. Here, however, Dr.

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<sup>3</sup>. Only one citation of Dr. Dong's Deposition, “According to Dr. Dong, MUSC breached the Agreement no later than June 17, 2010, forty-five days after the Agreement was signed on May 3, 2010,” citing Dr. Dong's deposition, P58, L1-23. See App. 31. However, there is no such statement by Dr. Dong on P58 or any where in Dr. Dong's deposition transcript. (App. 98)

Dong did provide his affidavit, deposition, and pleadings in supporting his opposition to Defendant's motion for summary judgment.

Therefore, the District Court erred in granting the Defendant's motion for summary judgment because there are multiple issues of material facts that needed to be determined, and the defendant failed its burden to prove the lack of genuine issue with evidence.

For the same reasons, the District Court also erred in denying Dr. Dong's motion for reconsideration and motion for amendment of the district court's Order granting Defendant's motion for summary judgment. As the basis for denying Dr. Dong's motions, the District Court erroneously stated that Dr. Dong failed to provide an affidavit and supporting documents. The error is both a matter of law and fact.

First, it is the burden of the moving party, the defendant, to provide proof of the lack of genuine issues of fact. “[The Defendant] fails to show the absence of a genuine issue of material fact is not entitled to summary judgment *even though his adversary does not come forward with opposing materials.*” *Standard Fire Ins. Co, id.* District court's shifting the burden of proof to the nonmoving party contradicts the established rulings by this Court and the Supreme Court.

Secondly, Dr. Dong did testify about the facts and argue pro se at the summary judgment hearing. Dr. Dong also provided pleadings, an affidavit, and transcript of his deposition in his opposition to the summary judgment, even though he is not

required to “come forward with opposing materials.” *id.* In contrast, the defendant’s counsel did not produce any witness, affidavit, or any document to support his argument as required by the law.

**II. The district court erred in limiting the discovery to practically nonexistent and issuing the summary judgement without allowing Dr. Dong the opportunity to conduct a meaningful discovery.**

The Law:

"Summary judgment is a drastic remedy and 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, 69, 580 S.E.2d 433, 439 (2003).

“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, *supra*. Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, *supra*. This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id.*” *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002) (emphasis added)

In the current case, the district court erred in restricting Dr. Dong’s discovery to practically nonexistent and granting the Defendant’s motion for summary judgment before Dr. Dong could have a meaningful discovery.

From the onset, the Defendant deployed a defense strategy of delaying, hampering, and blocking Dr. Dong's discovery to prevent Dr. Dong from gathering evidence and then moving to summary judgment to deprive Dr. Dong of due process.

Briefly, the court records show that:

1. The Defendant refused to answer Dr. Dong's Request for Production by responding to each question as "too broad and ambiguous." Then, Defendant filed a motion to alter or amend requesting the district court to restrict the scope of Dr. Dong's discovery to only emails "directly to or from Dr. Dong and Dr. Stephen Lanier no earlier than 2010."<sup>4</sup>.

The district court granted both of the Defendant's requests and denied Dr. Dong's motions to compel and to expand the scope of production. These decisions prevented Dr. Dong from obtaining the documents to show (1) the legal takeover of Dr. Dong's research by the department chairman at the time, James Norris, and (2) the breach of the

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<sup>4</sup>. Dr. Lanier was one of the perpetrators who participated in the illegal seizure of Dr. Dong's research assets, taking over of Dr. Dong's research operation, and had an interest in covering up the wrongdoing.

Separation Agreement by not returning Dr. Dong's assets, which are essential for continuing his research career at a different location.

2. The District Court strictly enforced an abbreviated timeline, which is requested by Defendant, over Dr. Dong's due process right for discovery. While the Defendant was stonewalling Dr. Dong's deposition requests, the District Court repeatedly denied Dr. Dong's motions for extending the timeline for deposition and motions for a protective order due to his documented lung infection and eye surgeries. Instead of using the "good cause" standard, the District Court denied Dr. Dong's motions because the motion "conflicted with the court's scheduling order." In contrast, the district court granted numerous motions for a protection order filed by the Defendant's attorneys for taking consecutive vacations. These orders took many weeks off the short timeline for Dr. Dong to take depositions. As a result, the District Court granted the Defendant's motion for summary judgment without allowing Dr. Dong to take any deposition of his witnesses.

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The Superior Courts including this Court have long established:

“An affirmative duty does exist to answer interrogatories and respond to requests to produce.” *CFRE, LLC v Greenville County Assessor*, 395 S. C. 67, 83, 716 S. E. 2d 877, 855 (2011).

“Objections to interrogatories must be specific and supported by a detailed explanation why the interrogatories are improper or may result in labor of the objections.” *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 260, 264 (N.D. Ill. 1979).

“The mere statement by a party that the interrogatories was ‘overly broad, burdensome, oppressive, and irrelevant’ is not adequate to a voice a successful objection to an interrogatory.” *Josephs v. Harris Corp.* 677 F.2d 985, 992 (3d Cir. 1982). “[Such statement] are, standing alone, meaningless and will be found meritless by the court. *Curtis v. Time Warner Entm’t-Advance/Newhouse P’ship*, 2013 WL2099496 at \*2 (D.S.C. May 14, 2013).

The district court contradicted these superior court’s rulings by endorsing the Defendant’s refusal of producing the requested documents and by preventing Dr. Dong from taking deposition of the witnesses.

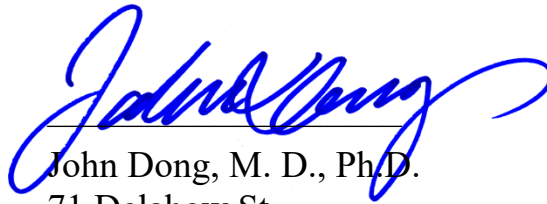
Therefore, the “summary judgment is not appropriate [because] further inquiry into the facts of the case is desirable to clarify the application of the law,” and such “a drastic remedy, which should be cautiously invoked[,] [] improperly deprived of [Dr. Dong] a trial of the disputed factual issues.” *Lanham, id.*

## CONCLUSION

HEREBY, for the reasons stated above, Appellant respectfully requests the honorable Court to REVERSE the Summary Judgment and remit the case to the district court for further proceedings under the Due Process.

Respectfully Submitted,

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