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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2024-000291
Case No. 2020-CP-40-02330

Davia Bunch and Casey Kelly, individually and on behalf of ..... others similarly situated, ...Appellants,

v.

The University of South Carolina,..... Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... **ERROR! BOOKMARK NOT DEFINED.**

COUNTER-STATEMENT OF ISSUES ON APPEAL 1

COUNTER-STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

A. Plaintiffs signed their Statements of Financial Responsibility, agreeing to pay for all charges billed to their accounts. 3

B. USC offers multiple views during the class registration process, meaning students may never see whether a class is in-person or online. 3

C. When the COVID-19 pandemic spread into South Carolina in January 2020, USC began implementing safety measures to protect its students. 4

D. On March 11, 2020, USC announced it would begin implementing virtual instruction. 5

E. Governor McMaster issued an Executive Order on March 15, 2020 to close all state-supported universities and authorized establishment and delivery of "virtual instruction and remote learning." 5

F. USC began providing prorated refunds to students on April 1, 2020 for non-academic fees and services that could not be provided to students once campus was closed. 6

G. Tuition and other fees were not refunded because they related to educational and technology services that students, including Plaintiffs, continued to receive. 6

H. USC distributed additional funds and other benefits to students. 8

I. Plaintiffs successfully completed the Spring 2020 semester, increased their GPAs, graduated, and obtained employment. 9

J. Plaintiffs never showed the circuit court that they were injured from the safety measures that USC provided them. 9

K. Plaintiffs sued USC for breach of contract, unjust enrichment, and equitable estoppel because their in-class classes were changed to remote instruction. 9

L. USC did not make a profit from a change of instruction. 10

STANDARD OF REVIEW 11

ARGUMENT 11

I. THE CIRCUIT COURT CORRECTLY FOUND THAT PLAINTIFFS HAVE NO STANDING BECAUSE THEY FAILED TO DEMONSTRATE ANY COGNIZABLE DAMAGES THAT DO NOT IMPLICATE THE EDUCATIONAL MALPRACTICE DOCTRINE. 12

A. Plaintiffs offer no evidence of cognizable harm. 12

B. If Plaintiffs were harmed by receiving online instruction, they would only have an impermissible educational malpractice claim. 17

C. Without damages, Plaintiffs have no standing to sue USC. 20

D. Plaintiffs' effort to achieve standing based on nominal damages was not preserved for appeal and fails otherwise. 21

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON USC'S BREACH OF CONTRACT CLAIM. 22

III. THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THE CONTRACT IS COMPRISED SOLELY OF THE STATEMENT OF FINANCIAL RESPONSIBILITY AND NOT VARIOUS SELF SERVICE CAROLINA ONLINE COURSE REGISTRATION LINKS. 24

A. Plaintiffs raise a new issue—that two instruments must be construed together—which cannot be raised for the first time on appeal and does not apply to the facts of this case 24

B. Because the Statement of Financial Responsibility was unambiguous as to intent of the parties and no genuine issues of material fact exist, the circuit court correctly decided USC's motion as a matter of law. 26

C. Although the circuit court did not need to look beyond the Statement of Financial Responsibility to grant summary judgment on Plaintiffs' contract and equitable estoppel claims, USC's Academic Bulletins expressly reserved the right to amend its courses, olicies, and procedures. 30

D. Plaintiffs' miscellaneous arguments also fail. 32

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT THE DOCTRINE OF IMPOSSIBILITY EXCUSED USC'S PERFORMANCE AS A MATTER OF LAW..... 33

V. THE CIRCUIT COURT CORRECTLY FOUND THAT THE DOCTRINE OF SOVEREIGN IMMUNITY BARRED PLAINTIFFS' CLAIMS AGAINST USC. 36

VI. THE CIRCUIT COURT CORRECTLY FOUND THAT PLAINTIFFS WAIVED THEIR RIGHT TO BRING THIS LAWSUIT BY ACQUIESCING TO VIRTUAL INSTRUCTION. 41

VII. THE CIRCUIT COURT CORRECTLY FOUND THAT PLAINTIFFS' EQUITABLE CLAIMS FAILED BECAUSE PLAINTIFFS CANNOT MAINTAIN BOTH BREACH OF CONTRACT AND EQUITABLE CAUSES OF ACTION, AND THEY FAILED TO SHOW GENUINE ISSUES OF MATERIAL FACT AS TO THE ELEMENTS OF THE CLAIMS 43

A. The circuit court correctly granted summary judgment on Plaintiffs' equitable claims because Plaintiffs cannot maintain both breach of contract claims and equitable causes of action based upon the same facts 43

B. Plaintiffs did not seek a ruling on the circuit court's construction of the facts underlying summary judgment on the equitable claims. 44

C. The circuit court correctly granted summary judgment on Plaintiffs' remaining arguments to support their equitable claims. 44

CONCLUSION 45

TABLE OF AUTHORITIES

Page(s)

Cases

50 Waterville St. Tr., LLC v. Vermont Mut. Ins. Co.,
647 F. Supp. 3d 62 (D. Conn. 2022), *reconsideration denied*, No. 3:21-CV-00368 (KAD), 2023 WL 2240290 (D. Conn. Feb. 27, 2023).....35

Acosta v. Dist. Bd. of Trustees of Miami-Dade Cmty. Coll.,
905 So. 2d 226 (Fla. Dist. Ct. App. 2005).....42

Archambault v. Sprouse,
215 S.C. 336, 55 S.E.2d 70 (1949).....43

Bankers Tr. of S.C. v. Benson,
267 S.C. 152, 226 S.E.2d 703 (1976).....32

Barnes v. Johnson,
402 S.C. 458, 742 S.E.2d 6 (Ct. App. 2013).....21

Black v. Freeman,
274 S.C. 272, 262 S.E.2d 879 (1980).....28

Blackwell v. Faucett,
117 S.C. 60, 108 S.E. 295 (1921).....29

In re Boston University COVID-19 Refund Litigation,
No. CV 20-10827-RGS, 2023 WL 2838379 (D. Mass. Apr. 7, 2023).....34, 35

Branning v. Morgan Guar. Tr. Co. of New York,
739 F. Supp. 1056 (D.S.C. 1990).....29

Brock v. Bennett,
313 S.C. 513, 443 S.E.2d 409 (Ct. App. 1994).....20

Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees,
344 S.C. 522, 544 S.E.2d 642 (Ct. App. 2001).....43

Burt v. Bd. of Trs. of the Univ. of R.I.,
84 F.4th 42 (1st Cir. 2023).....34

Cafe Assocs., Ltd. v. Gerngross,
305 S.C. 6, 406 S.E.2d 162 (1991).....24, 25

Curry v. Carolina Ins. Grp. of S.C., Inc.,
428 S.C. 60, 832 S.E.2d 760 (Ct. App. 2019).....26

Dema v. Tenet Physician Servs.–Hilton Head, Inc.,
383 S.C. 115, 678 S.E.2d 430 (2009) 21, 40

Dixon v. Univ. of Miami,
75 F.4th 1204 (11th Cir. 2023) 31

Elam v. S.C. Dep't of Transp.,
361 S.C. 9, 602 S.E.2d 772 (2004) 21, 24, 44

Equivest Fin., LLC v. Ravenel,
422 S.C. 499, 812 S.E.2d 438 (Ct. App. 2018).....37

Facelli v. Se. Mktg. Co.,
284 S.C. 449, 327 S.E.2d 338 (1985) 42

Foodbuy, LLC v. Gregory Packaging, Inc.,
987 F.3d 102 (4th Cir. 2021) 21

Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon,
394 S.C. 197, 715 S.E.2d 331 (2011) (Hearn, J. and Kittredge, J., dissenting).....14, 15

Fuller v. E. Fire & Cas. Ins. Co.,
240 S.C. 75, 124 S.E.2d 602 (1962) 21

Gardner v. S.C. Dep't of Revenue,
353 S.C. 1, 577 S.E.2d 190 (2003) 20

Gilliland v. Elmwood Props.,
301 S.C. 295, 391 S.E.2d 577 (1990) 29

Glasscock, Inc. v. U.S. Fid. & Guar. Co.,
348 S.C. 76, 557 S.E.2d 689 (2002) 35

Glob. Innovative Concepts, LLC v. State,
105 F.4th 139 (4th Cir. 2024) 37

Goldstein v. Univ. of Central Fla. Bd. of Trs.,
No. 6D23-1203, 2023 WL 5492043 (Fla. Dist. Ct. App. Aug. 25, 2023) 40

Hedgepath v. Am. Tel. & Tel. Co.,
348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001).....16

Hendricks v. Clemson Univ.,
353 S.C. 449, 578 S.E.2d 711 (2003) 17, 18, 33

Holmes v. E. Cooper Cmty. Hosp., Inc.,
408 S.C. 138, 758 S.E.2d 483 (2014) 11, 44

I'On, L.L.C. v. Town of Mt. Pleasant,
338 S.C. 406, 526 S.E.2d 716 (2000) 37

Jackson v. Bermuda Sands, Inc.,
383 S.C. 11, 677 S.E.2d 612 (Ct. App. 2009).....32

Kinsey Construction Co. v. S.C. Department of Mental Health,
272 S.C. 168, 249 S.E.2d 900 (1978), *overruled by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) 37, 38, 39, 40

Krebs v. Charlotte School of Law,
LLC, No. 3:17-CV-00190-GCM, 2017 WL 3880667 (W.D.N.C. Sept. 5, 2017) 18, 19

Lingefelt v. Forest Hills Homes, Inc.,
305 S.C. 197, 406 S.E.2d 394 (Ct. App. 1991).....29

Malloy v. Thompson,
409 S.C. 557, 762 S.E.2d 690 (2014) 21, 24, 33

McClintic v. Davis,
228 S.C. 378, 90 S.E.2d 364 (1955) 42

Michel v. Yale Univ., No. 3:20-CV-01080 (JCH), 2023 WL 1350220, (D. Conn. Jan. 30, 2023).....15

Minter v. GOCT, Inc.,
322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996).....13

Morin v. Innegrity, LLC,
424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018).....33

Moshtaghi v. The Citadel,
314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994).....25

Oppenheimer v. Scarafile,
No. 2:19-CV-3590, 2022 WL 2704875 (D.S.C. July 12, 2022).....43

Paynter v. N.Y. University,
310 N.Y.S.2d (N.Y. App. 1971) 18

Pepperdine University Tuition & Fees COVID-19 Refund Litig., No. CV 20-4928-DMG (KSX), 2023 WL 2576766 (C.D. Cal. Mar. 7, 2023.....35

Pres. Soc'y of Charleston v. S.C. Dep't. of Health and Env't Control,
430 S.C. 200, 845 S.E.2d 481 (2020) 20

Proffitt v. Sitton,
244 S.C. 206, 136 S.E.2d 257 (1964) 27

RentCo., a Division of Fruehauf Corp. v. Tamway Corp.,
283 S.C. 265, 321 S.E.2d 199 (Ct. App. 1984).....28

Rodarte v. Univ. of S.C.,
419 S.C. 592, 799 S.E.2d 912 (2017) 22, 23, 26

Roe v. Loyola University of New Orleans,
No. CIV.A. 07-1828, 2007 WL 4219174 (E.D. La. Nov. 26, 2007) 18

Rushing v. McKinney,
370 S.C. 280, 633 S.E.2d 917 (Ct. App. 2006).....40

S.C. Dept of Natural Resources v. Town of McClellanville,
345 S.C. 617, 550 S.E.2d 299 (2001) 22

S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.,
303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990), *aff'd*, 310 S.C. 232, 423 S.E.2d
114 (1992).....13

S.C. Pub. Int. Found. v. Wilson,
437 S.C. 334, 878 S.E.2d 891 (2022) 21

Sauner v. Pub. Serv. Auth. of S.C.,
354 S.C. 397, 581 S.E.2d 161 (2003) 10

Seabrook Island Property Owners Association v. Pelzer,
292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987).....42

Sossamon v. Texas,
563 U.S. 277 (2011).....37

State v. Bray,
342 S.C. 23, 535 S.E.2d 636 (2000) 22

State v. Dunbar,
356 S.C. 138, 587 S.E.2d 691 (2003) 21, 22

State v. Lindsey,
394 S.C. 354, 714 S.E.2d 76 (Ct. App. 2011).....35

State v. Prioleau,
345 S.C. 404, 548 S.E.2d 213 (2001) 22

Thalia S. v. Progressive Select Ins. Co.,
401 S.C. 395, 736 S.E.2d 863 (Ct. App. 2012).....11

U.S. Leasing Corp. v. Janicare, Inc.,
294 S.C. 312, 364 S.E.2d 202 (Ct. App. 1988).....29

Unisys Corp. v. S.C. Budget & Control Board Division of General Services Information Technology Management Office,
346 S.C. 158, 551 S.E.2d 263 (2001) 37, 38

In re University of Southern California Tuition & Fees COVID-19 Refund Litigation,
No. CV 20-4066-DMG, 2021 WL 3560783 (C.D. Cal. Aug. 6, 2021)
(Appellants' Initial Br. .).....31, 32

Vista Del Mar Condo. Ass'n v. Vista Del Mar Condos., LLC,
441 S.C. 223, 892 S.E.2d 532 (Ct. App. 2023), *reh'g denied* (Oct. 11, 2023) 11

Wheeler v. Globe & Rutgers Fire Ins. Co. of City of New York,
125 S.C. 320, 118 S.E. 609 (1923) 28

White Oak Manor, Inc. v. Lexington Ins. Co.,
407 S.C. 1, 753 S.E.2d 537 (2014) 35

Zwiker v. Lake Superior State University,
986 N.W.2d 427 (Mich. Ct. App. 2022) 26, 27, 43

Rules

S.C. Civ. Code Proc. 56(c).....11

S.C. Civ. Code Proc. 208 45

S.C. Civ. Code Proc. 220(c).....37, 45

Other Authorities

https://sc.edu/about/offices_and_divisions/registrar/academic_calendars/2019-20_calendar.php 10

January 13, 2020.
(https://sc.edu/about/offices_and_divisions/registrar/academic_calendars/2019-20_calendar.php.) 5

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court correctly find that Plaintiffs failed to demonstrate any cognizable damages that do not implicate the educational malpractice doctrine?
2. Did the circuit court correctly hold that the contract is comprised solely of the Statement of Financial Responsibility and not the various Self Service Carolina registration screens?
3. Did the circuit court correctly decide USC's motion as a matter of law because the Statement of Financial Responsibility was unambiguous as to intent of the parties and no genuine issues of material fact exist, the circuit court?
4. Did the circuit court correctly find that USC's Academic Bulletins expressly reserved the right to amend its courses, policies, and procedures?
5. Did the circuit court correctly find that the doctrine of impossibility excused USC's performance as a matter of law?
6. Did the circuit court correctly find that the doctrine of sovereign immunity barred Plaintiffs' claims against USC?
7. Did the circuit court correctly find that Plaintiffs waived their right to bring this lawsuit by acquiescing to virtual instruction?
8. Did the circuit court correctly find that Plaintiffs' equitable claims failed because they cannot maintain both breach of contract and equitable causes of action; they failed to show genuine issues of material fact as to the elements of the equitable claims; Plaintiffs did not meet the elements for their equitable claims?
9. Did Plaintiffs fail to preserve and/or abandon the following arguments for appeal: (1) standing is based on nominal damages; (2) the Statement of Financial Responsibility and various Self Service Carolina registration screens must be construed together; (3) "the

law does not require a contract to specify all of the consequences of breach as no drafter can foresee all future contingencies"; (4) Plaintiffs cannot maintain both breach of contract claims and equitable causes of action based upon the same facts; and (5) arguments concerning the *consequences* of a finding that registration is a part of the contract and the likelihood of those consequences arising; (6) the circuit court failed to construe the facts in Plaintiffs' favor on the equitable claims; and (7) public policy weighs in favor of the students' argument on incorporating the registration screens into the Statement of Financial Responsibility?

COUNTER-STATEMENT OF THE CASE

In addition to the Plaintiffs' procedural history in their Statement of the Case, USC adds the following:

After Plaintiff Bunch filed this lawsuit on May 6, 2020, Plaintiffs amended their complaint twice, filing the operative Second Amended Complaint on August 2, 2022.

USC filed a Motion for Summary Judgment on October 12, 2023 (USC's Mot. for Summ. J.) and filed a Memorandum in Support of Motion for Summary Judgment (USC's Mem. in Supp. of Mot. for Summ. J.) on all claims. Plaintiffs opposed USC's motion on November 9, 2023, and on November 16, 2023, USC filed a reply brief (USC's Reply in Supp. of its Mot. for Summ. J.). Oral arguments were held before the Honorable Jocelyn Newman on November 20, 2023. On February 2, 2024, the circuit court granted USC's motion on all of Plaintiffs' claims: breach of contract, unjust enrichment, and equitable estoppel.[1] The summary judgment order is the only order at issue on appeal.

[1] Plaintiffs' Complaint originally included claims of conversion against USC (8/2/22 Sec. Am. Compl. at ¶¶ 78-82, 108-111), which they later abandoned (6/10/24 Tr. of Oral Arguments at 34:5-8)

STATEMENT OF FACTS

Students at USC are required to enter into an agreement with the University to accept the responsibility to pay all charges billed to their account. Each semester of enrollment, as a prerequisite to registration for classes, students are required to accept the Student Statement of Financial Responsibility ("Statement of Financial Responsibility") in which the students expressly agree to "accept the responsibility for all charges billed to [their] account" by "submitting course registration." (USC_00001466.) This agreement is an express contract. Plaintiffs' claims in this case are based on the premise that when students complete a separate online registration form selecting classes, these selections are somehow incorporated into the Statement of Financial Responsibility, such that these class selections—and specifically the method of instruction—are a material term in the contract.

A. Plaintiffs signed their Statements of Financial Responsibility, agreeing to pay for all charges billed to their accounts.

Plaintiffs were USC undergraduates, graduating seniors in the 2020 Spring Semester. (Second Am. Compl. ¶ 13.) Plaintiffs signed Statements of Financial Responsibility (Kelly Dep., Ex. 1; Bunch Dep. Ex. 102), in which they agreed to pay USC for classes taken.

B. USC offers multiple views during the class registration process, meaning students may never see whether a class is in-person or online.

Students registered for their classes online on a platform called Self Service Carolina.[2] In support of its motion for summary judgment, USC submitted the Affidavit of Aaron Marterer, Registrar and Assistant Vice President for Enrollment Management in support of its motion for summary judgment. Mr. Marterer explained in his affidavit the process of registration and showed that students had multiple ways to register for classes in Self Service Carolina without

[2] Self Service Carolina is USC's web-based platform through which most USC students, among other things, register for classes. (*See* Marterer Aff., ⁋ 4.)

choosing a method of instruction or even seeing the instructional method for the class.[3] The method of instruction for a given class is available only through various hyperlinks depending upon how any given student registers, but to view this information, the student must seek it out specifically. (Marterer Aff., ¶¶ 13, 14, 17 and Exs. 62 and 73.)[4]

Plaintiffs maintain that screenshots from the registration pages on Self Service Carolina demonstrate that USC promised to provide certain courses in a specific modality, but these screenshots reflect only one possible view of the course information available for students to consider when they register for classes. Exhibit 62 to Mr. Marterer's deposition shows information that is only available when a student clicks on a class name to see "more details" about that class. Those details are purely descriptive and informational and do not create contractual obligations. As Mr. Marterer emphasized in his deposition, the Self Service Carolina registration site contains "a lot of information" and "it's all ***informational***." (Marterer Dep. at 31:23-32:13 (emphasis added).) None of the descriptive information on USC's registration website constituted a "promise" or a contractual obligation that all face-to-face classes would remain face-to-face in all circumstances, even if public health concerns dictated otherwise.

C. When the COVID-19 pandemic spread into South Carolina in January 2020, USC began implementing safety measures to protect its students.

[3] The three YouTube videos incorporated by reference in the Marterer Affidavit provide a brief and clear explanation of how students may register for classes and show that the instructional method is a characteristic that a student must seek specifically by clicking on hyperlinks. See *id*.

[4] In the circuit court, Plaintiffs misrepresented certain aspects of Mr. Marterer's deposition testimony and offered no evidence to contradict his Affidavit. For example, Plaintiffs stated, "The University unqualifiedly promised to provide the face-to-face instruction during the Spring 2020 semester." (Pls' Opp'n to Mot. for Summ. J. at 28, 37) (citing Marterer Dep. at 24:16-23). But Mr. Marterer said nothing like that and, instead, simply agreed with Plaintiffs' counsel that students first accept the Statement of Financial Responsibility, "and then they would start building out their courses based on what time they wanted to take the course, on what days, that kind of thing, if it was offered on those days . . . ." (Marterer Dep. at 24:16-23; see also *id*. at Exs. 62 and 73 to Marterer Dep.).

Classes in the 2020 spring semester at USC began on January 13, 2020. (https://sc.edu/about/offices_and_divisions/registrar/academic_calendars/2019-20_calendar.php.) That same month, the Centers for Disease Control and Prevention (CDC) alerted the country of the outbreak of COVID-19 abroad. In February 2020, USC—in consultation with the CDC, the South Carolina Department of Health and Environmental Control, and public health experts at USC—began a measured response to mitigate the spread of COVID-19 and keep its students safe. (Wilner[5] Rpt. at 5.)

D. On March 11, 2020, USC announced it would begin implementing virtual instruction.

When the COVID-19 pandemic struck the United States in the spring semester of 2020, all aspects of daily life were altered to prevent the spread of the deadly disease. Students went on Spring Break from March 8-15, 2020. By March 11, 2020, while students were still away from campus, USC announced it would implement virtual instruction beginning March 23, 2020. (Wilner Rpt. at 4-5; USC_00008841-2.) USC extended Spring Break an extra week to allow faculty and staff to prepare for the transition. (USC_00008841-2.)

E. Governor McMaster issued an Executive Order on March 15, 2020 to close all state-supported universities and authorized establishment and delivery of "virtual instruction and remote learning."

On March 15, 2020, Governor McMaster issued an executive order directing closure of all state-supported universities and authorized university officials to establish a "means to deliver

[5] Benjamin S. Wilner, Ph.D. serves as USC's damages expert. Dr. Wilner served as a professor of economics, finance, decision science, and statistics at the University of Michigan, the University of Iowa, Northwestern University, and the Helsinki School of Economics. Dr. Wilner has served as an expert witness and business consultant performing economic and statistical analyses in a wide variety of engagements, including financial analysis, contract losses, and a wide range of class action, intellectual property, insurance claim, lost profits, and lost income matters. (Wilner Rpt. at 3-4 and Exhibit 2.)

virtual instruction and remote learning." (USC_00000849-51.) At that time, USC announced it would close all system institutions to everyone except those with extenuating circumstances and that it would extend virtual instruction and services through the remainder of the 2020 spring semester—six weeks of classes followed by exams. (Wilner Rpt. at 5; USC_00005271-2.) This act of pivoting classes to virtual instruction consumed an extraordinary amount of effort, attention, coordination, technological resources, and financial resources across the entire university. It required the cooperation of all eight USC campuses in twenty locations across the state of South Carolina to quickly respond to an unprecedented situation to protect its students while continuing to maintain the excellence in all of its academic programs.

F. USC began providing prorated refunds to students on April 1, 2020 for non-academic fees and services that could not be provided to students once campus was closed.

On April 1, 2020, USC announced it would follow the guidance and direction of the South Carolina Commission on Higher Education and provide prorated refunds to students for non-academic fees related to university housing, meal plans, and parking permits, as those services could not be provided to students after March 16, the first day the campus was closed following spring break. (USC_00004993-4; USC_00005126-7) In total, USC issued more than $20.7 million in prorated refunds. (Wilner Rpt. at 6.)

G. Tuition and other fees were not refunded because they related to educational and technology services that students, including Plaintiffs, continued to receive.

Students continued to receive instruction and technology services before, during, and after the transition to virtual instruction. (Def's. Ans. to Interrog. 24.) Importantly, the cost of tuition per credit hour was the same no matter the mode of instruction, and tuition rates remained the same whether a student signed up for all in-person courses, all online courses, or a mix of in-

person and online courses. For example, Plaintiff Bunch chose to enroll in two online courses, in addition to three in-person courses, for the spring 2020 semester but was charged the same tuition and fees for these online courses as she was for her in-person courses. (Bunch Dep. at 18:9-22; Wilner Rpt. at 7.)

Plaintiffs also both paid a $200 technology fee for the spring 2020 semester—a fee paid by all students, even those taking all online classes or enrolled in USC's online degree completion program through its Palmetto College. (Bunch Dep. at 72:2-24 and 94:23-95:11; Def.'s Answer to Interrog. 8.) Plaintiffs incorrectly assumed that the technology fee pays for "computers and WiFi and printers all over campus,"[6] when, in reality, the technology fee is used for the "enhancement of technology," including, for example, helping "acquire, install, and maintain up-to-date and emerging technologies to enhance student-learning outcomes." (USC_00015756.)

Plaintiff Kelly admits that when USC transitioned to virtual instruction, it "shifted to massive use of Blackboard, Blackboard Collaborate, webcams, computer services, as well as training, and those are all technology fee support." (S. Kelly Dep. 42:17-20; *see also* Wilner Rpt. at 18.) Similarly, Plaintiff Bunch admits that the use of technology was essential to USC's continuation of classes during the pandemic, and both Plaintiffs used Blackboard, Blackboard Collaborate, Self Service Carolina, Microsoft Teams, and other online platforms paid for and maintained by USC throughout the 2020 spring semester. (Bunch Dep. at 95:12-15.) USC's Department of Technology even assisted students who did not have adequate resources to participate in remote classes by shipping laptops and offering funding for unlimited data for

[6] C. Kelly Dep. at 134:16-25 and 170:5-24; Bunch Dep. at 93:23-94:22.

hotspots. (USC_00008957-61.) USC also offered online laboratory classes during the 2020 Spring Semester. (Wilner Rpt. at 34-35.)

Thus, even in the face of the unprecedented worldwide pandemic, USC made sure that its students continued to receive a robust educational experience and opportunities for interactions with professors and other students online, with tuition and fees used only for the purpose of furthering USC's educational mission.

H. USC distributed additional funds and other benefits to students.

USC also distributed $17.6 million of federal relief funds pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act[7] to aid 25,168 students system-wide who qualified and accepted the award. USC further provided over $350,000 from its own donor-supported Covid-19 Emergency Relief Fund to support 1,899 students facing financial hardship and other burdens due to the unexpected challenges created by the pandemic and transition to virtual instruction. (Wilner Rpt. at 6 and 75.) Plaintiff Bunch herself received $800 in grant money under the CARES Act. (Bunch Dep. at 48:19-49:6.) Because Plaintiff Kelly failed to complete a FAFSA form to be eligible to receive CARES Act funding, she did not receive funding, nor did either Plaintiff seek financial support through USC's COVID-19 Emergency Relief Fund. (*Id.*)

Beyond those benefits, in keeping with USC's core principle of maintaining academic excellence while also acknowledging the disruptions COVID-19 caused, USC provided a special benefit that ordinarily was not available by allowing undergraduate students the option of

[7] The CARES Act, which established and funded the Higher Education Emergency Relief Fund, provided one-time funding to institutions to "provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to the coronavirus." (USC_00013751-5.) To fulfill the Department of Education's guidance, the USC system institutions issued grants to students across all levels as determined by each student's FAFSA form.

switching their classes to being graded on a pass/fail basis. (USC_00002343.) USC was not required to provide this benefit to students, and students were allowed to accept the pass/fail option after receiving their letter grades at the end of the semester. (*Id.*)

I. Plaintiffs successfully completed the Spring 2020 semester, increased their GPAs, graduated, and obtained employment.

Plaintiffs do not dispute that they accomplished all of their course objectives during the Spring 2020 semester, received full academic credit, increased their cumulative GPAs, graduated with honors, and obtained employment. (Cavanagh Rpt. at 3, 8, and 17;[8] Wilner Rpt. at 7.) Plaintiff Kelly surpassed her cumulative GPA of 3.42 to earn a 3.8 GPA during Spring 2020. (Cavanagh Rpt. at 8.) Similarly, Plaintiff Bunch outperformed her 3.728 cumulative GPA by earning a 3.9 GPA for the Spring 2020 semester. (*Id.*)

Also, prior to graduating, Plaintiff Bunch accepted a job as a finance manager at a political consulting firm in Charleston, South Carolina. (Wilner Rpt. at 7.) Plaintiff Kelly similarly accepted an offer before graduating to work in Qualcomm's marketing department in San Diego, California starting in June 2020. (*Id.*; CKELLY000007.)

J. Plaintiffs never showed the circuit court that they were injured from the safety measures that USC provided them.

Plaintiffs never put forth one piece of evidence to show they were injured, and the evidence is overwhelming that they were not.

K. Plaintiffs sued USC for breach of contract, unjust enrichment, and equitable estoppel because their in-class classes were changed to remote instruction.

[8] Thomas B. Cavanagh, Ph.D. served as a consulting expert in this matter. Dr. Cavanagh is the Vice Provost for Digital Learning at the University of Central Florida, and he has been widely recognized as a national educational expert on digital learning and teaching. (Cavanagh Rpt. at 19-47.)

Final exams for the Spring 2020 semester concluded on May 6, 2024. (*See* https://sc.edu/about/offices_and_divisions/registrar/academic_calendars/2019-20_calendar.php.) Only one week later, on May 13, 2020—despite making uninterrupted progress toward her degrees and receiving the benefits of their education—Plaintiff Bunch filed a complaint seeking refund of tuition and fees, which was the first objection that either of the Plaintiffs made to USC about tuition and fees. Specifically, Plaintiffs purport to represent a proposed class of undergraduate, graduate, and professional USC students who seek a partial tuition refund, in addition to the $20.7 million in prorated refunds already provided by USC and CARES Act funds that USC distributed (USC_00004993-4; USC_00005126-7) and despite the fact that the cost of virtual and face-to-face instruction are *the same*. (Bunch Dep. at 18:9-22; Wilner Rpt. at 7-8.)[9]

L. USC did not make a profit from a change of instruction.

Contrary to Plaintiffs' allegations, USC did not make a profit from changing from in-person to online tuition, and in fact, "data show that USC's costs increased because of the transition." (Wilner Rpt. at 48.) Although it is true that USC had a budget surplus, that was due to the influx of funds from the CARES Act. Budget surpluses are not reimbursed to the students, but are always carried forward to the next year to benefit the brand of the school and future students, most of whom are in the class. (*Id.* at 46.) "[A]s a non-profit entity, USC does not distribute any excess profits; any excess would be reinvested in students." (*Id.* at 48.)

[9] Plaintiffs filed a motion for class certification, which was fully briefed before the circuit court. The circuit court found it unnecessary to address class certification because it granted summary judgment on all claims. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (finding it unnecessary to address class certification because the court was granting summary judgment in favor of the defendant).

STANDARD OF REVIEW

"The appellate court reviews the grant of summary judgment by applying the same standard the circuit court applied pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. . . . When the circuit court grants summary judgment on a question of law, [the Court of Appeals] review[s] the ruling de novo. Furthermore, '[i]n determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Once the moving party carries its initial burden [of demonstrating the absence of a genuine issue of material fact], the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.' " *Vista Del Mar Condo. Ass'n v. Vista Del Mar Condos., LLC*, 441 S.C. 223, 232–33, 892 S.E.2d 532, 537 (Ct. App. 2023) (cleaned up & citations omitted), *reh'g denied* (Oct. 11, 2023).

"[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 153-54, 758 S.E.2d 483, 492 (2014) (citation omitted). "The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." *Thalia S. v. Progressive Select Ins. Co.*, 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) (citation omitted).

ARGUMENT

The circuit court's decision in favor of Respondent USC may be affirmed on multiple grounds, discussed below.

I. The circuit court correctly found that Plaintiffs have no standing because they failed to demonstrate any cognizable damages that do not implicate the educational malpractice doctrine.

A. Plaintiffs offer no evidence of cognizable harm.

Plaintiffs offered no proof of actual damages. Nowhere do Plaintiffs submit proof that they suffered harm by receiving online instruction for the latter half of the Spring 2020 semester due to the pandemic. And the undisputed facts belie any notion that Plaintiffs were harmed by the transition to online instruction. Students in the Spring 2020 semester at USC continued with the same courses for the same credits taught by the same faculty as before the pandemic. Further underscoring the interchangeability of online classes with in-person classes, Plaintiffs both were, by their own choice, already taking online and hybrid (partially online and partially in person) classes, and they paid the same tuition regardless of the mode of instruction they received.[10] Plaintiffs do not dispute these circuit court findings, and in fact, as the circuit court correctly found, Plaintiffs themselves have never identified any damages. (Cavanagh Rpt. at 3 and 8; Wilner Rpt. at 7; Order at 5-6.)[11] Without establishing a genuine issue of material fact as to the element of damages, all of Plaintiffs claims fail and Plaintiffs also lack standing. (Order at 7.)

[10] Plaintiff Bunch chose to enroll in two online courses, in addition to three in-person courses, for the Spring 2020 semester, and her decision to take these online courses instead of in-person classes had no effect on her tuition. (Bunch Dep. at 18:9-22; Wilner Rpt. at 7.) Similarly, Plaintiff Kelly chose to take two hybrid courses, as the syllabi for these classes plainly indicated. (FAMS 308 Syllabus, at USC_00047903; SPAN 122 Syllabus, at USC_00047918-9; USC_00002318.) Plaintiffs offered no evidence that online classes have a lower tuition cost than in-person courses.

[11] As stated above in the Statement of Facts, Plaintiffs do not dispute that they accomplished all of their course objectives during the Spring 2020 semester, received full academic credit, increased their cumulative GPAs, and accepted employment upon graduation. (Cavanagh Rpt. at 3, 8, and 17; Wilner Rpt. at 7.) Plaintiff Kelly surpassed her cumulative GPA of 3.42 to earn a 3.8 GPA during Spring 2020. (Cavanagh Rpt. at 8.) Similarly, Plaintiff Bunch outperformed her 3.728 cumulative GPA by earning a 3.9 GPA for the Spring 2020 semester. (*Id.*) Prior to graduating, Plaintiff Bunch accepted a job as a finance manager at a political consulting firm in

Rather than providing any proof of actual damage, Plaintiffs argue that receiving a "different product" is, by itself, a legally cognizable harm—no substitutions of any kind are allowed, not even when governmentally ordered for health and safety reasons in a deadly pandemic. But they cite no authority, in South Carolina or otherwise, that supports such a finding. Instead, they offer a flawed hypothetical in which a customer who orders ice cream but receives broccoli suffers legally cognizable harm from receiving a different product, even though the broccoli provided calories and a more nutritious form of food. (Appellants' Initial Br. at 20-21.)

Chastising "the circuit court's erroneous understanding of contract law," Plaintiffs argue they are entitled to damages for their lost benefit of the bargain, presumably much as the broccoli recipient would be entitled to such damages. (Appellants' Initial Br. at 20.) Under South Carolina law:

> In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed. That is, damages give him the benefit of his bargain. In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed.

S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 77, 399 S.E.2d 8, 10–11 (Ct. App. 1990), *aff'd*, 310 S.C. 232, 423 S.E.2d 114 (1992) (citations omitted). "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996).

Plaintiffs allege in the Second Amended Complaint in the claim for breach of contract for tuition damages, that they are entitled to recover "the difference between the value of the online

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Charleston, South Carolina. (Wilner Rpt.) Plaintiff Kelly similarly accepted an offer before graduating to work in Qualcomm's marketing department in San Diego, California starting in June 2020. (*Id.*; CKELLY000007.)

learning which is being provided versus the value of the live in-person instruction in a physical classroom on Defendant's campus that was contracted for." (Second Am. Compl. ¶ 67.) In their cause of action for breach of contract as to fees, Plaintiffs pleaded damages consisting of "the pro-rata amount of fees that were collected but for which access and services were not provided." (*Id.* at ¶ 98.) Plaintiffs lump together these two causes of action for purposes of arguing standing on appeal. Applying the measure of contract damages as set forth above to the claim for tuition and fees damages, Plaintiffs must show "the gain above costs that would have been realized had the contract been performed." Here, one is left to wonder what additional "gain" Plaintiffs would have realized if USC had continued providing in-person classes and educational services during the pandemic.

Plaintiffs only assert that their experience would have been "different," but proof of how this difference harmed Plaintiffs or what "different" gain they would have realized is notably absent. Even acknowledging that only reasonable certainty as opposed to mathematical precision would be required, and even when viewing the evidence in the light most favorable to Plaintiffs, their claim for damages is "too speculative" because Plaintiffs have "provided nothing but bald assertions and conjecture, with no real factual support" that they were actually harmed, much less that they were harmed more than they would have been if USC had required them to attend classes in person during the pandemic. *See Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 207–08, 715 S.E.2d 331, 336 (2011) (Hearn, J. and Kittredge, J., dissenting). "Indeed, it is exceedingly difficult to fathom, absent pure speculation, how [Plaintiffs were] actually and monetarily damaged by [USC's] failure to" continue in-person classes during the pandemic. *Id.* (alterations added). Accordingly, "allowing this case to proceed to trial will place a

jury in the impossible position of assessing damages where none can even be articulated, let alone proven." *Id.* [12]

And even the broccoli analogy, provided as a substitute for supporting facts and law, does not help Plaintiffs. Neither food nor any other tangible product is at issue here. Educational services, a much more complex deliverable, is. And Plaintiffs received all indicia of the exact education they sought, including knowledge, grades, credits, and ultimately good jobs. (Order at 6 n.5). So, how were they harmed by having their education and services provided online, rather than risking death by attending school in person during the pandemic? Further, if USC had provided in-person classes and labs in violation of the Governor's order, Plaintiffs would plainly have been harmed far more seriously by exposure to COVID-19 and potentially facing criminal charges. A closer ice cream analogy would be this: Plaintiff contracts for ice cream, but the store burned down after she received only one scoop, so the store mailed in an insulated, dry ice package the second scoop for Plaintiff to consume at home. That would be different, but Plaintiff received what she paid for and would not have cognizable damages.

[12] A primary reason that Plaintiffs are unable to establish actual monetary loss is because USC charges the same tuition and fees for online instruction as it does for face-to-face instruction. See Michel v. Yale Univ., No. 3:20-CV-01080 (JCH), 2023 WL 1350220, at *6-7 (D. Conn. Jan. 30, 2023) (granting summary judgment in favor of university because there was "no evidence in the record from which a reasonable juror could calculate the financial detriment" student experienced, finding there was undisputed evidence that university had always "charged the same tuition for online and in-person instruction"). The cost per credit hour at USC was the same no matter the mode of instruction. These tuition rates remained the same whether a student signed up for all in-person courses, all online courses, or a mix of in-person and online courses. Instead, students were assessed tuition based on campus, residency, and status as either a part-time or full-time student regardless of whether they signed up for a class with an instructional method of "face-to-face" or some online modality. For example, Plaintiff Bunch chose to enroll in two online courses, in addition to three in-person courses, for the Spring 2020 semester but was charged the same tuition and fees for these online courses as she was for her in-person courses. (Bunch Dep. at 18:9-22; Wilner Rpt. at 7.)

Last, Plaintiffs argue that "different *is* necessarily harmful under contract law (unless the breaching party can prove substantial performance, which is a fact-bound determination inappropriate for summary judgment)." Notably absent from this argument is a citation to authority, but taking this naked assertion at face value, USC has provided ample evidence in the record that it substantially performed, and Plaintiffs have failed to create a genuine issue of material fact as to that performance. Plaintiffs agree that USC did provide in-person educational services during the first half of the Spring 2020 semester and that after being ordered to close the campus, the school provided online instruction, allowing Plaintiffs to advance just as they would have absent the necessary transition. Plaintiffs have pointedly and repeatedly urged that their "claims are not based on the 'quality' of the ERT they received but for USC's failure to refund fees for services (including technology and lab fees) they did not provide as well as their failure to provide 'in-person classes' (after agreeing to do so)." (Plaintiffs' Opening Br. at 11.) This argument is circular, however, because no refund (i.e., damages) would be required absent a substitute performance that was not of at least the same quality as that required by the contract. Plaintiffs further acknowledge that USC did provide refunds for housing, meals, and parking: services that USC, in fact, was not able to provide at all, due to the campus closure. (USC_00004993-4; USC_00005126-7) In short, on this point, Plaintiffs have failed to "come forward with specific facts showing that there is a genuine issue for trial" as to USC's substitute performance, such that Plaintiffs were actually damaged. *Hedgepath v. Am. Tel. & Tel. Co.,* 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (citations and internal quotation marks omitted).

B. If Plaintiffs were harmed by receiving online instruction, they would only have an impermissible educational malpractice claim.

The circuit court correctly found that Plaintiffs failed to show a genuine issue of material fact with respect to actual harm, and that Plaintiffs can only show harm if they allege their educational services were deficient. As the circuit court held:

> But "different" is not necessarily harmful, and Plaintiffs must show actual harm to meet the damages element of all of their claims. Plaintiffs cannot have their cake and eat it too by insisting that they are not seeking damages for receiving an inferior education (and hence not barred by the educational malpractice doctrine), while simultaneously alleging they were damaged because they received an education that is materially different from what they signed up for. In arguing their alleged injury was not receiving the "product" for which they contracted, Plaintiffs fail to explain how they can establish they were damaged without comparing the value of the two (supposedly) different products and showing that what they received purportedly had less value or worse quality than what they bargained for. Indeed, the only way for Plaintiffs to show actual harm would be to show they received inferior instruction because they received a portion of a semester's teaching remotely instead of in-person. Such an evaluation would necessarily require the Court to make judgments about the quality of the academic curriculum, including faculty members, student engagement and learning, and other qualitative factors, which is precisely where this Court cannot venture under the educational malpractice doctrine.

(Order at 6-7.)

The circuit court was exactly correct in this ruling. To the extent Plaintiffs are able to prove damages, their claims must be dismissed because Plaintiffs may not maintain a claim for receiving a deficient education in South Carolina. Such education malpractice claims are not recognized. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 457, 578 S.E.2d 711, 715 (2003) (finding that claims brought by students alleging an inadequate education constituted impermissible claims for educational malpractice). In *Hendricks* the South Carolina Supreme Court identified several policy concerns with recognizing these types of claims, including "(1) the lack of a satisfactory standard of care by which to evaluate educators, (2) the inherent uncertainties of the cause and nature of damages, and (3) the potential for a flood of litigation

against already beleaguered schools." *Id.* at 457, 578 S.E.2d at 715 (citations omitted). Following *Hendricks*, the circuit court found that these same policy concerns applied just as strongly to Plaintiffs' claims here. (Order at 16.) The educational malpractice bar relates to any claim seeking damages for an impaired education, whether in contract or tort. *Id*. at 460, 578 S.E.2d at 716.

In similar COVID-19 tuition refund cases across the country, courts have dismissed similar complaints as impermissible educational malpractice suits. Beyond the COVID-19 related litigation, other courts have also dismissed lawsuits in which a university arranged instruction at a different school and by different professors (*Roe v. Loyola University of New Orleans*, No. CIV.A. 07-1828, 2007 WL 4219174 (E.D. La. Nov. 26, 2007)) or suspended classes midway through a semester without any alternative means of instruction (*Paynter v. N.Y. University*, 310 N.Y.S.2d, 893, 893-94 (N.Y. App. 1971)); *see also Krebs v. Charlotte School of Law*, LLC, No. 3:17-CV-00190-GCM, 2017 WL 3880667, at *34 (W.D.N.C. Sept. 5, 2017).

- Notwithstanding Plaintiffs' protests that they are not seeking damages for an impaired education, they repeatedly allude to the alleged diminished quality of online learning and emergency remote instruction. (See Second Am. Compl. ¶ 28 and Appellants' Initial Br. at 23 (referring to emergency remote instruction as "doubtlessly inferior"); *see also* Second Am. Compl. at ¶¶ 46, 64, 66, 67 (making allegations about the character, differences, and value of online learning compared to face-to-face instruction). Moreover, Plaintiffs' damages expert, Ted Tatos, repeatedly relies upon literature purportedly proving "Emergency Remote Teaching" ("ERT") is inferior to in-person instruction. (*See* Tatos Rpt. at 10-11, 30-34.) In fact, Mr. Tatos's entire methodology for computing Plaintiffs' alleged damages is based on his assumption that the benefits of ERT are less than the benefits of normal face-to-face instruction. Specifically, Mr.

Tatos purports to quantify the amount of tuition and fees that should be disgorged based upon "the amount that students overpaid for the education benefits they received versus those for which they paid." (*Id.* at 51.) He counts 49 days during which instruction was provided solely online for face-to-face classes after the pandemic ("the 49 days"). (*Id*., Table 6.) He claims that ERT provided during the 49 days was a "difference in kind of educational instruction and experience" and that damages can be calculated as a measure of "the difference in the benefits attendant to the instruction and college experience agreed upon versus the benefits, or lack thereof, that accompanied [ERT]." (*Id*. at 48.)

Plaintiffs also should not be allowed to mischaracterize the true and obvious nature of their claims in an effort to circumvent the educational malpractice bar. To this end, Plaintiffs argue that they do not seek damages because of deficiencies in their education as provided, but because USC completely failed to deliver in-person instruction after the onset of the pandemic. This argument ignores the very obvious reality that USC did continue to provide instruction to students after the onset of the pandemic, and Plaintiffs even concede that "[t]he quality of the substitute product USC provided may go toward limiting the damages Appellants suffered." (Appellants' Initial Br. at 22.) USC did not cancel classes for the remainder of the semester, nor did it cease operations and send students to another university. As a result, Plaintiffs cannot claim that their purported damages resulted from USC's failure to perform at all.[13] Instead, Plaintiffs seek a "disgorgement of the difference between the value of the online learning which is being

[13] Notably, as previously stated, USC did provide refunds for services that it was completely unable to provide, including housing, meals, and parking. (USC_00004993-4; USC_00005126-7.) A complete failure to perform is very plainly different from providing a substitute performance or substantially performing in light of unexpected eventualities. In the latter case, Plaintiffs must show that the substitute or substantial performance was inadequate to establish a breach.

provided versus the value of the live in-person instruction in a physical classroom on [USC's] campus that was contracted for." (Second Am. Compl. ¶ 67.)

Plaintiffs do not and cannot contend that USC's shift to virtual classrooms prevented students from completing their coursework or being awarded the expected credits toward graduation because the undisputed evidence shows otherwise. (Cavanagh Rpt. at 3 and 8.) Accordingly, an assessment of Plaintiffs' alleged damages would be impossible without an arbitrary calculation of the value of the educational experience delivered by USC after the implementation of the COVID-19 emergency action plan.

Plaintiffs have put forth no other theory as to what harm they experienced from having to take their classes online for the remainder of the Spring 2020 semester or how to calculate the damages for such alleged harm. As a result, Plaintiffs' claims necessarily implicate the educational malpractice doctrine, and the circuit court correctly granted summary judgment in favor of USC.

C. Without damages, Plaintiffs have no standing to sue USC.

Because Plaintiffs do not meet the standard of proof required to avoid summary judgment as it relates to their actual damages as set forth above, and because to prove harm, Plaintiffs would run afoul of the educational malpractice bar, Plaintiffs have no standing to bring their claims. As the circuit court correctly recognized, a student who has not suffered damages lacks standing to bring any claim against a defendant. *See Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 23 n.14, 577 S.E.2d 190, 201 n.14 (2003); *see also Pres. Soc'y of Charleston v. S.C. Dep't. of Health and Env't Control*, 430 S.C. 200, 209, 845 S.E.2d 481, 486 (2020). "Once it is determined a plaintiff has no standing to prosecute, the court must dismiss the action." *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994). Whether Plaintiffs lack standing is a

question of law. *See S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022).

Here, each of Plaintiffs' causes of action requires a showing of damages, and Plaintiffs have none. *See Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) breach of contract); *Barnes v. Johnson*, 402 S.C. 458, 474, 742 S.E.2d 6, 14 (Ct. App. 2013) (promissory estoppel); *Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 124, 678 S.E.2d 430, 435 (2009) (unjust enrichment).

D. Plaintiffs' effort to achieve standing based on nominal damages was not preserved for appeal and fails otherwise.

Recognizing their failure to show a genuine issue of material fact as to their damages, Plaintiffs raise a new theory for the first time on appeal—that they are entitled to nominal damages for breach of contract, thereby establishing standing. (Appellants' Initial Br., at 21.) Plaintiffs did not raise this issue to the circuit court either in their complaint, briefs, or oral argument, so the court did not rule on this issue, and the argument is not preserved. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Also, "[a] party may not argue one ground at trial and an alternate ground on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003); *see also Foodbuy, LLC v. Gregory Packaging, Inc.*, 987 F.3d 102, 116 (4th Cir. 2021) ("[W]e need not reach Foodbuy's 'novel contention that nominal damages alone, without any other cognizable form of relief, can create standing,' because it never asserted it was entitled to nominal damages

in its Complaint. To be sure, Foodbuy did include a boilerplate request for 'other and further relief as the Court deems just and proper,' but that language does not preserve a nominal damages claim when 'there is absolutely no specific mention in the Complaint of nominal damages.' "). Here, Plaintiffs do not make any reference to recovering nominal damages in the Second Amended Complaint, and they have otherwise failed to raise this issue before the circuit court. (*See* Sec. Am. Compl.)

Further, even if an issue is preserved, if it is not set forth in the Statement of Issues on Appeal, the Court cannot consider it. *Dunbar,* 356 S.C. at 142, 587 S.E.2d at 693 ("No point will be considered which is not set forth in the statement of issues on appeal.") (*citing State v. Bray,* 342 S.C. 23, 28, 535 S.E.2d 636, 639, n.2 (2000)); *State v. Prioleau,* 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). Plaintiffs' statement of issues on appeal does not reference whether Plaintiffs could be entitled to recover nominal damages or whether the possibility of nominal damages may suffice to establish standing.

II. The circuit court properly granted summary judgment on USC's breach of contract claim.

The circuit court properly granted summary judgment because Plaintiffs' claims are merely an attempt to alter the terms of a plain and unambiguous contract. A contract is unambiguous when "capable of only one reasonable interpretation." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 599, 799 S.E.2d 912, 918 (2017). The "construction of a clear and unambiguous" contract is a "question of law for the court." *See S.C. Dept of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). When dealing with an unambiguous contract, the court's "only function is to interpret its lawful meaning, discover the intention of the parties as found ***within the agreement***, and give effect to it." *Id.* (citation and internal quotation marks omitted) (emphasis added). This is so that the contract will be

"governed by *the objective manifestation of the parties' assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it." *Rodarte*, 419 S.C. at 603, 799 S.E.2d at 917-18.

Here, the Statement of Financial Responsibility provides, in pertinent part:

> The University of South Carolina requires all students acknowledge the financial arrangement between the student and the University. By submitting course registration I am entering into a financial arrangement with the University, and I accept responsibility for all charges billed to my account. I understand that my USC bill will be posted online in Self-Service Carolina (SSC) . . .

(C. Kelly Dep., Ex. 10.) The circuit court correctly found the Statement of Financial Responsibility to be "clear and unambiguous." (Order Granting Def. ['s] Mot. for Summ. J. 9). The circuit court was correct because the Statement of Financial Responsibility plainly means that students agree to pay for the courses they register for. It does not have any words indicating that by paying tuition, students are entitled to receive a specific form of instruction.

The circuit court also correctly found the Statement of Financial Responsibility unambiguously does not include the details of course registration, and therefore, Plaintiffs failed to demonstrate a contractual duty that USC breached by moving to online instruction during the pandemic. Plaintiffs' arguments supporting their breach of contract claim are, as the circuit court held, "untenable," and merely an attempt to obfuscate a straightforward matter to create entitlement to a right that does not exist. (Order at 9.)[14]

[14] At the beginning of their brief, Plaintiffs' falsely claim that the circuit court "ignored the fact that the Statement of Financial Responsibility expressly references the course registration," which allegedly caused the court to substantively err by narrowing its analysis to a single document. (Appellant's Initial Br. at 12). As set forth below, such argument is frankly incorrect, as the circuit court expressly acknowledged the mention of "course registration" in the Statement of Financial Responsibility and rejected Plaintiffs' argument.

III. The circuit court was correct in holding that the contract is comprised solely of the Statement of Financial Responsibility and not various Self Service Carolina online course registration links.

Because the Statement of Financial Responsibility does not state Plaintiffs were entitled to a particular form of instruction, Plaintiffs seek to expand the contract to include certain additional terms contained in the online course registration. Each of Plaintiffs arguments should be rejected because they were either not preserved, not supported by the facts and the law, or both.

A. Plaintiffs raise a new issue—that two instruments must be construed together—which cannot be raised for the first time on appeal and does not apply to the facts of this case.

Plaintiffs claim that the circuit court erred by failing to construe the Statement of Financial Responsibility and course registration together because they are two instruments "executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction," (Appellant's Initial Br. at 12, 13.) This argument, however, was not raised below and is not preserved for appeal. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779; *Malloy*, 409 S.C. at 561, 762 S.E.2d at 692.

Even if the Court considers this new argument on appeal, it should fail because the registration form is not an "instrument" that fits within this rule of construction. Plaintiffs claim that the Statement of Financial Responsibility and course registration should be construed together because "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together." *Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991).

Plaintiffs, however, cannot meet the requirements to apply the two-instrument rule for several reasons. First, they fail to establish that the course registration details constitute an

"instrument." Specifically, the two-instrument rule of construction only arises when both instruments are contractual. *See Moshtaghi v. The Citadel*, 314 S.C. 316, 321, 443 S.E.2d 915, 918 (Ct. App. 1994) ("Under South Carolina law, two ***contracts*** executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole.") (emphasis added). Here, there are not two instruments. As held by the circuit court, "[c]hoosing classes in the registration process did not embody the formalities necessary for the formation of a contract, and a 'clickwrap' agreement, like any other contract, only arises where the requisite formalities exist and a meeting of the minds is reached." (Order at 10 n.9). Further, undisputed facts show that course registration did not have an "I agree" box, present the instructional method as having any legal significance, or involve any contractual offer, nor was it "executed" by Plaintiffs, as required by the two-instrument rule.

Application of the two-instrument rule also fails because the Statement of Financial Responsibility and course registration were not executed for the same purpose. The purpose of the Statement of Financial Responsibility is to memorialize the student's express agreement to pay for taking classes at USC. The purpose of the course registration is for the student to pick the course, including the time, day, and professor.

In addition, Plaintiffs' improperly seek to apply to this case the two-instrument rule stated in *Cafe Associates*. But in *Cafe Associates*, the court construed together an Asset Purchase Agreement that contained a non-compete clause and a covenant not to compete that included *the same language* as the purchase agreement, except omitting a time restriction. The court, therefore, found that the two agreements were "substantially the same, cover[ed] the same subject matter, and both were executed during the course of the same transaction by the same parties for the same purpose." 305 S.C. at 10, 406 S.E.2d at 165. In contrast, the Statement of

Financial Responsibility and registration form are completely different documents with completely different language and much different purposes—one to memorialize a student's financial agreement to pay tuition and the other to allow the student to select specific courses. The purpose of the Statement of Financial Responsibility is obviously to obligate students to pay their tuition bills before allowing them to register for their classes. It does not state anything about USC's obligation to allow students to take the classes they register for, much less with particular professors, in certain classrooms, or in person. The registration also makes no reference to financial obligations. Therefore, even if preserved, this theory does not apply here.

B. Because the Statement of Financial Responsibility was unambiguous as to intent of the parties and no genuine issues of material fact exist, the circuit court correctly decided USC's motion as a matter of law.

Plaintiffs argue that the circuit court should have submitted factual matters regarding the intent of the parties to the jury. (Appellants' Initial Br. at 14-18.) The circuit court, however, was correct to grant USC's motion as to the breach of contract claim as a matter of law because the contract at issue is unambiguous. *See Curry v. Carolina Ins. Grp. of S.C., Inc.*, 428 S.C. 60, 73-74, 832 S.E.2d 760, 767 (Ct. App. 2019) ("Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms. A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one.") (alteration in original); *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917 (2017).[15] The Statement of Financial

[15] The circuit court properly relied on *Zwiker v. Lake Superior State University*, 986 N.W.2d 427, 443 (Mich. Ct. App. 2022). Plaintiffs argue Zwiker is not on point, incorrectly claiming that the students there had no written agreement with the school. However, in *Zwiker*, the university had a financial agreement strikingly similar to the ones at issue here, and it also referenced "course registration," which its plaintiffs used to fabricate a supposed contractual obligation of in-person

Responsibility plainly states the students' obligation to pay: "By submitting course registration I am entering into a financial arrangement with the University of South Carolina and I accept responsibility for all charges billed to my account." (USC_00001466.) This "financial arrangement" is devoid of any mention of the mode of instruction, any language evidencing an intent by USC to obligate itself to deliver course offerings in a particular mode, any obligation on the part of USC to provide instruction in person (or at a given date, time, and place) even in the event of a pandemic or other circumstances that would imperil the interests of the student body and the university.

The facts here are similar to those in *Proffitt v. Sitton*, 244 S.C. 206, 136 S.E.2d 257 (1964), where the plaintiff claimed a contract conveying property to him and providing that the seller "agrees to install a 6 inch water line" meant that the seller was selling the water line as one of the properties. The court held, "to sustain [plaintiff's] position, the Court would be required to interpolate words of conveyance not present in the contract. The contract provided that 'The Seller agrees to install a 6 inch water line' but makes no reference to its sale to [plaintiff]." *Id.* at 212–13, 136 S.E.2d at 260 (cleaned up). The court continued, "If the intention of the parties is clear, the Courts have no authority to change the contract in any particular and have no power to interpolate into the agreement a condition or stipulation not contemplated either by the law or by the contract between the parties." *Id.* at 213, 136 S.E.2d at 260 (cleaned up) The same is true

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instruction. The appellate court found "no error in the trial courts' conclusions that the financial agreements between the parties were unambiguous and did not promise live, in-person instruction," 986 *id.*at 444 , which is exactly what USC argues here. And just like Plaintiffs do in this case, one of the student plaintiffs in Zwiker "provided screenshots and excerpts from the [university's] registration portal and course catalog, as well as marketing information," and the court found that "[n]one of the[se] documents promised that if [the student] paid tuition, the [university] 'would exclusively provide in-person instruction.'" *Id*. at 443.

here. To accept Plaintiffs' interpretation of the contract would require the court to add words to an unambiguous contract, and this is not allowed.

Plaintiffs rely on *Black v. Freeman*, 274 S.C. 272, 273, 262 S.E.2d 879, 880 (1980), a case in which an ambiguity did exist, although they do not explain how it applies here. (Appellants' Initial Br. at 14-15.) In *Black*, the contract was ambiguous as to whether the term "per sq. ft" in a construction contract related to heated square feet or all square feet. This is a classic ambiguity because the term "sq. ft" could have either of the two meanings suggested. Plaintiffs point to no such ambiguous terms in the Statement of Financial Responsibility, nor can they. The contractual language at issue in this case is complete, simple, unambiguous, and shows a purpose that is easily understood, thus making it a question of law for the court. *Wheeler v. Globe & Rutgers Fire Ins. Co. of City of New York*, 125 S.C. 320, 118 S.E. 609, 612 (1923) ("In the absence of latent ambiguity, it is for the court to construe a written contract. . . . Even in the case of a latent ambiguity, if there is no conflict in the evidence the question is one of law for the court.").

The absence of an integration clause also does not open the gates for the court to consider the course registration materials to be a part of the contract. (*See* Appellant's Initial Br. at 13.) Plaintiffs rely on *RentCo., a Division of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct. App. 1984) to argue that absent an integration clause, "the course registration is just as much part of the parties' contract as the [Statement of Financial Responsibility]," but in *RentCo.*, the court considered a prior oral agreement that was consistent with the contract at issue, and the court recognized that "[o]rdinarily, a prior parol agreement pertaining to the same subject matter as a subsequent written agreement is presumed to have been incorporated and merged into the written agreement." *Id.* Here, the registration process does

not take place until after a student executes the Statement of Financial Responsibility, and Plaintiffs are seeking to vary the terms of the contract by adding to it various potential details about classes a student registers to take. "When a written agreement is clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to the execution of a written instrument may not be used to contradict, explain, or vary the terms of the written instrument." *Lingefelt v. Forest Hills Homes, Inc.*, 305 S.C. 197, 200–01, 406 S.E.2d 394, 396 (Ct. App. 1991). Furthermore, an integration clause is not required for the court to conclude that a separate document is not intended to be incorporated into a contract. *See Branning v. Morgan Guar. Tr. Co. of New York*, 739 F. Supp. 1056, 1062 (D.S.C. 1990) (finding that a merger clause in a written agreement was not necessary for the court to determine that a side agreement was not merged into the contract at issue).

Further, Plaintiffs rely on extrinsic evidence such as Plaintiff Bunch's deposition testimony and USC's COVID-19 Faculty Guidance to support their interpretation of the contract. (Appellants' Initial Br. at 14.) However, "if the writing *on its face* appears to express the whole agreement," as here, evidence of contemporaneous agreements or understandings cannot be used "to add another term thereto." *See U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 318, 364 S.E.2d 202, 205 (Ct. App. 1988) ("if the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term thereto."); *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990); *Blackwell v. Faucett*, 117 S.C. 60, 108 S.E. 295, 296 (1921) ("When a writing, upon its face, imports to be a complete expression of the whole agreement, and contains thereon all that is necessary to constitute a contract, it is presumed that the parties have introduced into it every material item and term, and

parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed.").

Here, because the Statement of Financial Responsibility appears complete on its face and contains all necessary elements, parol evidence may not be used to add terms that would guarantee students they would receive their classroom instruction in person, even in the midst of a pandemic. Plaintiffs are not seeking to introduce extrinsic evidence to resolve an ambiguity; they seek to add new terms that did not previously exist.

C. Although the circuit court did not need to look beyond the Statement of Financial Responsibility to grant summary judgment on Plaintiffs' contract and equitable estoppel claims, USC's Academic Bulletins expressly reserved the right to amend its courses, policies, and procedures.

Even if the Court looks beyond the Statement of Financial Responsibility to determine the terms of the contract, as Plaintiffs urge this Court to do, Plaintiffs' claims still fail based on USC's express reservation (in the 2019-2020 Academic Bulletins) of its right to amend its course offerings, policies, and procedures at any time.[16] Specifically, all Academic Bulletins across the USC system contained an express disclaimer that USC "reserves the right to make changes in curricula, degree requirements, course offerings, or academic regulations at any time when, in the judgment of the faculty, the president, or the Board of Trustees, such changes are in the best interest of the students and [USC]." (USC_00001467) Therefore, USC could change class locations, times, professors, and modes of instruction—such an in-person instruction—when, as here, circumstances required.

USC also provided evidence showing that even long after the students registered for classes, USC's professors had the authority to plan and provide a mode of instruction that

[16] USC's Academic Bulletins are the official documents of record concerning USC's academic programs and regulations, which were provided to students during course registration in Self Service Carolina. (USC_00001467.)

differed from the instructional method listed when students registered for classes. (Cavanagh Rpt. at 4.) USC's reservation of its right to make changes obviously exists to allow USC to make changes to its operations in the face of unprecedented and unexpected circumstances like the COVID-19 pandemic. Because of this express reservation, USC is not liable for exercising its right to change the manner in which curricula are presented, particularly in the midst of a global pandemic. *See Dixon v. Univ. of Miami*, 75 F.4th 1204, 1210 (11th Cir. 2023) (holding that "even if Miami's contract included a provision for in-person classes and access to campus facilities, [it] agree[d] with the district court that Miami cannot be held liable for switching to remote learning at the time and under the conditions that it did" because "Miami retained 'the express right to alter or amend its procedures or policies' " in the Student Handbook.)

In addition, Plaintiffs' argument that the Academic Bulletins are not part of the contract between USC and the students (Appellants' Initial Br. at 18-19) is irrelevant because USC does not contend otherwise. However, even though not a part of the contract itself, USC's express reservation of rights to change registration details demonstrates that no meeting of the minds could exist as to such details. As the Eleventh Circuit held in a similar COVID-19 tuition refund case, "if [the university] has the ability to change the underlying policies and procedures that create the implied contractual term, it follows that the implied term itself is subject to change." *Dixon*, 75 F.4th at 1209. As in *Dixon*, because USC reserved its right to change class details, it could not have a contractual duty to honor all such details.

In response to *Dixon*, Plaintiffs rely on the California case *In re University of Southern California Tuition & Fees COVID-19 Refund Litigation*, No. CV 20-4066-DMG (PVCx), 2021 WL 3560783, at *7 (C.D. Cal. Aug. 6, 2021) (Appellants' Initial Br. at 18-19.) There, the court denied a motion to dismiss, finding the disclaimer "relates only to academic classes," but it did

not apply to claims for breach of express contracts relating to *non-academic* benefits students were allegedly denied during the pandemic. *Id*. The California court did not find the disclaimer to be unenforceable as applied to breaches relating to academics.

Finally, contrary to Plaintiffs' argument, Plaintiff Bunch's deposition statement that she did not "recall" seeing the Academic Bulletin does not prove that the bulletin was not provided to her, and Plaintiff Bunch's speculative statement does not rise to the level of "conflicting evidence" to create a jury issue. See *Bankers Tr. of S.C. v. Benson*, 267 S.C. 152, 154–55, 226 S.E.2d 703, 704 (1976) ("If a material issue of fact can be created by a denial based on ignorance of the facts and neglecting to pursue discovery, the office of summary judgment would be mummified."); *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) ("A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court.") (citations omitted).

D. Plaintiffs' miscellaneous arguments also fail.

Plaintiffs include a scattershot of arguments that mischaracterize the circuit court's Order, raise issues that were not presented to the circuit court, or at best simply do not help their case.

For example, Plaintiffs incorrectly argue the circuit court was "trafficking in speculation" by stating that students may not see the instructional method when registering for classes. (Appellants' Initial Br. at 17.) However, when read in context, the circuit court's fact-based finding is that students sign the Statement of Financial Responsibility *before* course registration

(which Plaintiffs do not dispute)—*i.e.*, before ever seeing the method of instruction for their classes. In fact, the court correctly noted that students may not ever see the instructional method when registering (which Plaintiffs also do not dispute). (Order at 11; *see also* Marterer Aff. ¶ 30.) These observations bolster the circuit court's finding that registration details are not contractual because students are required to execute the Statement of Financial Responsibility without knowing these details and potentially without ever seeing a screen showing them. Accordingly, Plaintiffs' additional argument that they happened to see the instructional method during registration is irrelevant.

Finally, Plaintiffs argue, with no supporting authority, that "the law does not require a contract to specify all of the consequences of breach as no drafter can foresee all future contingencies." (Appellants' Initial Br. at 16.) This was not raised and ruled upon by the circuit court, and therefore is not preserved for appeal. *Malloy*, 409 S.C. at 561, 762 S.E.2d at 692.

Also unpreserved for appeal, for failure to have the argument raised and ruled on by the circuit court, are Plaintiffs' arguments that a court cannot consider the *consequences* of a finding that registration is a part of the contract and the likelihood of those consequences arising (Appellants' Initial Br. at 17). *See id*. Also, even if preserved, courts do consider the consequences of their rulings, such as in *Hendricks v. Clemson University*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003) (prohibiting claims for educational malpractice, based in part on "the potential for a flood of litigation against already beleaguered schools").

IV. The circuit court correctly found that the doctrine of impossibility excused USC's performance as a matter of law.

Plaintiffs do not dispute the circuit court's finding that in-person classes were rendered impossible under Governor McMaster's executive order, nor could they. *See Morin v. Innegrity, LLC*, 424 S.C. 559, 567, 819 S.E.2d 131, 136 (Ct. App. 2018) ("A party to a contract must

perform its obligations under the contract unless its performance is rendered impossible by an act of God, *the law*, or by a third party.") (emphasis added); *Burt v. Bd. of Trs. of the Univ. of R.I.*, 84 F.4th 42 (1st Cir. 2023) (affirming circuit court's discharge of university's duty to perform in related COVID-19 case, and holding that pandemic and governor's resulting orders "substantially frustrated the principal purpose of the contracts – the provision of in-person, on-campus instruction – and made performance of the contract impracticable").

On appeal, Plaintiffs' principal argument is that the circuit court erred in rejecting their claim that USC would still be required to return the portion of tuition and fees it collected for services "not rendered." (Appellants' Initial Br. at 24-25.) But the circuit court was correct in finding that nothing in the law, including the Restatement, states that Plaintiffs should be entitled to restitution. (Order at 24.)

Plaintiffs also claim that, even if performance were impossible, USC "would still be liable to return the portion of tuition and fees it collected for services not rendered." (Appellants' Initial Br. at 25.) It is true, as Plaintiffs mention, that another state's court in *In re Boston University COVID-19 Refund Litigation*, No. CV 20-10827-RGS, 2023 WL 2838379, at *4 (D. Mass. Apr. 7, 2023) stated that even though the university's performance was excused, it "must still provide restitution for the ***difference in value*** between what they were promised and what they received." *Id.* (emphasis added). That court rejected, however, the opinion of the plaintiffs' expert on the amount of "any possible restitution damages" and found that the expert's testimony was "insufficient to create a genuine dispute of material fact as to the existence or amount of any restitution damages." *Id.* Similarly, here, Plaintiffs failed to proffer any evidence that would support awarding restitution damages, let alone a theory that does not impermissibly stray into

the province of educational malpractice.[17] Indeed, damages measured as Plaintiffs suggest, by the difference in value between what they were promised and what they received, are precisely the type of damages prohibited by educational malpractice and which Plaintiffs claim they are not seeking. (Plaintiffs' Initial Br. at 25) (quoting *In re Boston Univ.*, 2023 WL 2838379, at *3).

Finally, Plaintiffs argue that the circuit court erred by finding that USC's online instruction constituted substantially equivalent substitute performance because that is a question of fact that must go to the jury. (Appellant's Initial Br. at 25.) However, Plaintiffs cited no authority for this argument and, therefore, the argument is abandoned on appeal. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 76, 78 (Ct. App. 2011); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (2002). Furthermore, the circuit court correctly considered and ruled on this issue, finding that USC provided "the only possible substantially equivalent substitute performance by continuing to provide educational instruction and services to its students while keeping them and the rest of the USC community safe and complying with the Governor's orders." (Order at 24.)

The circuit court's statement is supported entirely by undisputed facts, as set forth above, and accordingly, Plaintiffs cannot show what facts are in dispute as to the substitute performance. *See White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014)

[17] Plaintiffs are correct that in In re Pepperdine University Tuition & Fees COVID-19 Refund Litig., No. CV 20-4928-DMG (KSX), 2023 WL 2576766, at *6 (C.D. Cal. Mar. 7, 2023), the court allowed plaintiff to "pursue restitution on a quasi-contract theory" because performance of any implied contract "has been rendered impossible." The court, however, perplexingly went on to state that it would not constitute educational malpractice to allow plaintiffs to "calculate [their] damages [on said quasi-contract claim] by determining the objective value of an in-person education relative to an online-only education." Id. (emphasis added.) USC respectfully submits that comparing the value of in-person versus online education is exactly what South Carolina's educational malpractice doctrine prohibits, and at any rate, Plaintiffs presented no such evidence, other than to say the online instruction was "different," and as is discussed above, such an argument is insufficient to create a genuine issue of material fact as to damages.

("We find the circuit court did not abuse its discretion in holding White Oak substantially complied with the service-of-suit clause."); *50 Waterville St. Tr., LLC v. Vermont Mut. Ins. Co.*, 647 F. Supp. 3d 62, 72 (D. Conn. 2022), *reconsideration denied*, No. 3:21-CV-00368 (KAD), 2023 WL 2240290 (D. Conn. Feb. 27, 2023) ("[A]n issue [such as whether an insured has substantially complied with all contractual provisions] that ordinarily presents a question of fact may become a question of law when the mind of a fair and reasonable factfinder could reach only one conclusion; or where the undisputed subordinate facts require such conclusion as a matter of law.") (finding that there was no reasonable substitute). Here the relevant facts are undisputed: USC could not provide in-person instruction, and so it instead provided educational services online. The circuit court therefore correctly found USC provided substantially equivalent substitute performance, and Plaintiffs did not attempt to prove otherwise because to do so would run afoul of the educational malpractice bar.

V. The circuit court correctly found that the doctrine of sovereign immunity barred Plaintiffs' claims against USC.

Nothing in Plaintiffs' brief or the record in this case supports reversal of the trial court's order on sovereign immunity grounds. Plaintiffs argue that the court's ruling on sovereign immunity grounds is "entirely reliant on the court's finding that there was no express contractual promise to provide educational instruction and services in person or in any specific modality." (Appellants' Initial Br. at 20; Order at 25-27.) They also argue that their unjust enrichment and promissory estoppel claims are not barred by sovereign immunity because they are quasi-contract claims. (*Id*.) Both arguments fail, for the reasons outlined below.[18]

[18] USC addressed above Plaintiffs' contention that the trial court erred in finding that the contract did not include a promise for face-to-face instruction.

The trial court correctly found that "Plaintiffs have failed to identify a waiver of USC's sovereign immunity for claims arising from the switch to online instruction and operation in the Spring 2020 semester in response to the COVID-19 pandemic." (Order at 26.) Plaintiffs below argued that by entering into a contract to provide face-to-face instruction regardless of the circumstances, USC waived sovereign immunity to suit for breach of that same alleged contract. (Order at 25-27.) They relied on *Kinsey Construction Co. v. S.C. Department of Mental Health*, 272 S.C. 168, 172, 249 S.E.2d 900, 903 (1978), *overruled by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), and *overruled by Unisys Corp. v. S.C. Budget & Control Board Division of General Services Information Technology Management Office*, 346 S.C. 158, 551 S.E.2d 263 (2001),[19] to contend that by entering into a contract USC had waived immunity from suit for breach of ***their alleged contract***. Putting aside the dubious viability of *Kinsey*, Plaintiffs stretch *Kinsey* beyond its reach—and certainly beyond the reach of sound waiver analysis.[20]

In *Kinsey*, the Supreme Court allowed a suit by a building contractor for breach of contract because the State failed to pay for construction that the contractor performed. The case

[19] The S.C. Supreme Court overruled *Kinsey*'s general waiver of sovereign immunity for breach of contract claims in *Unisys Corp.*, holding that the State waives its immunity related to a breach of contract claim ***only*** when a statute governs the specific contract at issue, and there is no such statutory waiver in this case. Although the circuit court determined that it did not need to resolve this issue, this Court may consider the issue as an additional sustaining ground. *See Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 507–08, 812 S.E.2d 438, 442 (Ct. App. 2018) (citing *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000)), *id*. at 420, 526 S.E.2d at 723 and Rule 220(c), SCACR).

[20] *See, e.g., Sossamon v. Texas*, 563 U.S. 277, 293 (2011) (noting the rule that waivers of sovereign immunity must be strictly construed and holding that "States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under [the Act at issue] because no statute expressly and unequivocally includes such a waiver."); *Glob. Innovative Concepts, LLC v. State*, 105 F.4th 139 (4th Cir. 2024) (applying federal law) (state did not waive its immunity from suit for breach of contract by entering into a contract for purchase of COVID-19 test kits).

presented no issue as to the terms of the contract or the existence of a contractual obligation to pay the contractor. The court held, under those circumstances, that "wherever 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***." *Kinsey*, 272 S.C. at 172, 249 S.E.2d at 903 (1978) (emphasis added).[21] Plaintiffs overlook the limitations inherent in *Kinsey*'s holding and stretch the waiver concept to an extent that would subject the sovereign to suit under circumstances evidencing no intent by the sovereign to waive its immunity. Statutory waivers of sovereign immunity must be strictly construed. S*ee Unisys Corp.*, 346 S.C. at 167, 551 S.E.2d at 268 ("a statute waiving the State's immunity from suit, being in derogation of sovereignty, must be strictly construed"). There is no authority to suggest the opposite approach should apply to implicit waivers, and in any event this case and the alleged contract here are entirely different from *Kinsey*.

USC "reserve[d] the right to make changes in . . . course offerings . . . at any time when, in the judgment of the faculty, the president, or the Board of Trustees, such changes are in the best interests of the students and the University." (USC_00001467.) In the Spring of 2020, South Carolina found itself suddenly and without warning in the grip of a pandemic. The Governor, having previously declared a state of emergency, issued an Executive Order closing campuses of public universities and authorizing universities to implement virtual instruction. (Henry McMaster, Executive Order No. 2020-09 at p. 2, § 2 (Mar. 15, 2020).) Consistent with its stated policy and the Governor's Executive Order, USC shut down its campuses and opted to deliver course offerings via online instruction for the remainder of the Spring 2020 semester. (Wilner Rpt. at 5; USC_00005271-2.)

[21] Plaintiffs never identified the statutory authority supporting their alleged contract.

The contract between USC and students—the students' agreement to pay for classes—is set forth in the Statement of Financial Responsibility, which is plain and unambiguous. It never mentions the mode of instruction—and never once says that USC obligates itself to provide courses that match the mode of instruction reflected in the registration materials regardless of the circumstances. The only thing Plaintiffs identify as saying anything about face-to-face instruction is information available to students via links within the course registration materials.[22] Registering for classes, however, did not ***require*** students to click on those links or ever see the mode of instruction. In other words, accessing the mode-of-instruction information was not necessary to complete the registration process.

To find that sovereign immunity was waived under these circumstances, the court would have to ignore the acts of the sovereign prior to and during the time of the COVID-19 pandemic, and it would have to determine that information that students might access in the course registering for classes trumped the words and acts of the sovereign. The court would have to ignore USC's Academic Bulletin and the policy set forth therein, the Governor's Executive Orders, USC's decision to shut down campuses and provide online instruction, and the fact that USC acted in accordance with both the Governor's Executive Orders and its own considered decision concerning the best interests of students and the university. The court would have to declare the primacy of mode-of-instruction information that was available (but not necessary) to students in the registration process over all the foregoing acts of the sovereign. Under the circumstances, *Kinsey* and the other authorities on which Plaintiffs rely do not support the

[22] In the process of registering, students were also provided other information about the classes, such as the time, date, and place of the class and the professor teaching the class. If Plaintiffs' theory were correct, by mentioning those things in the course registration materials USC waived sovereign immunity, and any time a professor or the university changed the time or date or location of the class, or substituted one professor for another, the university would be subject to suit by the student for breach of contract.

conclusion that the sovereign waived its immunity from suit for breach of the alleged contract in this case.

As the circuit court correctly held, waiver of sovereign immunity for contract claims should not be implied where there is no express language to manifest a contractual obligation assumed by the sovereign and a corresponding waiver of immunity to suit on that obligation. (Order at 26, citing, *Goldstein v. Univ. of Central Fla. Bd. of Trs.*, No. 6D23-1203, 2023 WL 5492043, at *2 (Fla. Dist. Ct. App. Aug. 25, 2023)).[23] USC is not arguing broadly that it can enter into contracts like the one in *Kinsey*—such as building contracts, leases, etc.—and accept the benefits of those contracts yet escape the obligations evidenced by those contracts. But when the acts and words of the sovereign evidence no intent to waive immunity, there is no waiver. And this Court should not find a waiver based on information appearing under a link in the course registration materials.

Finally, Plaintiffs ignore the circuit court's finding that the doctrine of sovereign immunity also completely bars Plaintiffs' unjust enrichment and promissory estoppel claims because they are equitable doctrines,[24] and the General Assembly has not waived sovereign immunity for equitable cases of action seeking monetary relief against governmental entities under either the South Carolina Tort Claims Act or any other legislation that expressly or implicitly waives sovereign immunity for such equitable claims. Plaintiffs' attempt to categorize these claims as quasi-contract claims fails because, as explained above, there has been no waiver

[23] The court in *Goldstein* concluded that there was "simply no basis for [it] to ignore sovereign immunity" where the university had "taken no action requiring [the court] to apply the breach of contract exception." 2023 WL 5492043, at *3.

[24] *See Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) ("Unjust enrichment is an equitable doctrine . . . ."); *Rushing v. McKinney*, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) ("The doctrine of promissory estoppel is equitable in nature." (citation and internal quotation marks omitted)).

of immunity for suit for breach of the alleged contract, and thus there can have been no waiver for quasi-contract claims. The cases cited by Plaintiffs for their argument do not address this issue and, therefore, do not support a finding of waiver for equitable claims.

VI. The circuit court correctly found that Plaintiffs waived their right to bring this lawsuit by acquiescing to virtual instruction.

The circuit court correctly found that Plaintiffs failed to demonstrate a genuine issue of material fact to combat summary judgment based on Plaintiffs' waiver of their rights to bring their claims by acquiescing to the many benefits that USC provided during the COVID-19 pandemic. Plaintiffs do not dispute the circuit court's factual findings that they (1) failed to lodge any objection to USC's shift to virtual instruction at the time of the transition in Spring 2020; (2) voluntarily remained enrolled in their courses after the pivot to remote instruction; (3) failed to ask for any reimbursement or refund at the time of the transition; (4) accepted the prorated refunds that USC issued to students for non-academic fees related to university housing, meal plans, and parking permits; and (5) accepted and enjoyed all the benefits that USC provided for the remainder of the Spring 2020 semester, which included, among many other things, the provision of full course credit and degrees. (Order at 28.) Again borrowing Plaintiffs' hypothetical concerning a customer ordering ice cream but being served broccoli, discussed above, the law would not allow the customer getting the wrong order to eat the broccoli, then object and demand her money back. (Appellants' Initial Br. at 20-21,)

Despite Plaintiffs' acquiescence to USC's pivot to remote instruction, Plaintiffs state—as if it were a fact—that the circuit court concluded that Plaintiffs had to "immediately quit school" upon learning of the change to remote instruction before they could bring this lawsuit. (Appellants' Initial Br. at 25, 26.) The court stated no such thing. Instead, the court cited settled authority holding that a plaintiff cannot stand by without objection to another party's actions and

allow the other party to continue providing benefits without objections making no objection whatsoever when she believes her rights are being violated. (Order at 27-29.) *See Seabrook Island Property Owners Association v. Pelzer,* 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987); *Facelli v. Se. Mktg. Co.,* 284 S.C. 449, 451-52, 327 S.E.2d 338, 339 (1985); *Acosta v. Dist. Bd. of Trustees of Miami-Dade Cmty. Coll.,* 905 So. 2d 226, 228–29 (Fla. Dist. Ct. App. 2005).

Here, Plaintiffs knowingly withheld even the slightest hint of any objection whatsoever to online instruction until after they had reaped the benefits, thereby establishing waiver and acquiescence. *See id.*; *see also McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955) (cited by Plaintiffs).[25] Plaintiffs cited no authority that their duty to mitigate damages allows them to fail to object to a change until after reaping the benefits. If that were the rule, waiver and acquiescence could never take place.

Also, Plaintiffs claim that USC did not rely to its detriment on Plaintiffs' acquiescence to online learning. This argument is based on the speculation that USC would have instituted virtual instruction regardless of their objection. (Appellants' Initial Br. at 25-26.) However, Plaintiffs ignore the circuit court's correct finding that USC detrimentally relied on Plaintiffs' acquiescence by providing classes and services to Plaintiffs in the midst of the global pandemic, allowed Plaintiffs to make uninterrupted progress toward their degrees, and did in fact provide the course credits and awarded the degrees to Plaintiffs *before* Plaintiffs lodged any objection or expressed their dissatisfaction. (Order at 28-29) (citing *Seabrook Island Prop. Owners Ass'n* and *Acosta*).

[25] Plaintiffs' argument that their lawsuit was filed immediately after the end of the Spring 2020 semester does not support their position because it further highlights the fact that Plaintiffs waited to object until *after* they received all their credits and degrees from USC. (Appellants' Initial Br. at 25.)

Finally, Plaintiffs—citing no authority—claim that waiver and acquiescence are questions of fact that must go to the jury. (Appellants' Initial Br. at 25.) Plaintiffs' waiver and acquiescence present questions of law, for which there is no right to a jury trial. *See, e.g., Archambault v. Sprouse*, 215 S.C. 336, 340, 55 S.E.2d 70, 71 (1949); *Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001) (finding there is no right to a jury trial for equitable remedies); *Oppenheimer v. Scarafile*, No. 2:19-CV-3590, 2022 WL 2704875 (D.S.C. July 12, 2022) (ruling on summary judgment on issues of wavier, acquiescence, and estoppel).

VII. The circuit court correctly found that Plaintiffs' equitable claims failed because Plaintiffs cannot maintain both breach of contract and equitable causes of action, and they failed to show genuine issues of material fact as to the elements of the claims.

The circuit court correctly found that Plaintiffs' equitable claims failed because (1) they cannot maintain both breach of contract and equitable causes of action based on the same facts; (2) they failed to show genuine issues of material fact as to the elements of the claims; and (3) they are barred by the sovereign immunity and educational malpractice doctrines.

A. The circuit court correctly granted summary judgment on Plaintiffs' equitable claims because Plaintiffs cannot maintain both breach of contract claims and equitable causes of action based upon the same facts.

Plaintiffs do not address the circuit court's finding that they cannot maintain both breach of contract claims and equitable causes of action based upon the same facts, and therefore, they have abandoned any argument on appeal against the court's ruling. *See* Order at 33-34 (citing *Zwiker v. Lake Superior State Univ.*, 986 N.W.2d 427, 445-46 (Mich. Ct. App. 2022) (finding that the financial responsibility agreement in a tuition refund case "did not promise live, in-person instruction" and that—because it "specifically addressed student payment obligations when registering for courses" and "governed the same subject matter as [the students'] equitable

claims"—and that grant of summary judgment on the students' equitable claims was proper because "[c]ourts may not imply a contract under an unjust-enrichment theory if there is an express agreement covering the same subject matter").

B. Plaintiffs did not seek a ruling on the circuit court's construction of the facts underlying summary judgment on the equitable claims.

Plaintiffs also argue that the circuit court failed to construe the facts of unjust enrichment in the light most favorable to them (Appellants' Initial Br. at 27), but this issue is not preserved for appeal because they failed to file a 59(e) motion to raise it to the circuit court and have the court rule on it. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Furthermore, Plaintiffs did not identify any facts that the court allegedly failed to properly construe or how the facts should have been construed differently. To the contrary, the circuit court devoted several pages showing the basis for summary judgment on these claims, supported with legal authority and facts to show the missing elements of both equitable claims—facts that were "susceptible of only one reasonable interpretation." *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014).

C. The circuit court correctly granted summary judgment on Plaintiffs' remaining arguments to support their equitable claims.

The circuit court correctly found that (1) Plaintiffs' equitable claims are barred by the sovereign immunity and educational malpractice doctrine; (2) Plaintiffs have not met the "injury" element for either equitable claim; and (3) USC did not make an "unambiguous promise" to continue providing at all times in-person instruction and on-campus academic services for which fees are paid, even during the pandemic and in violation of state law, which is a required element for promissory estoppel. (Appellants' Initial Br. at 26-27.) These findings are correct, as discussed above.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the circuit court. USC also respectfully asks the Court to affirm for any ground appearing on the record as provided by Rules 208 and 220(c) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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