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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Hon. Jocelyn Newman, Circuit Court Judge

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

Appellants,

v.

The University of South Carolina,

Respondent.

APPELLANTS' INITIAL REPLY

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I. The Circuit Court's Contract Analysis Was Erroneous.

A. The Trial Court Should Have Construed the Statement of Financial Responsibility and Registration Together.

Respondent argues that the Circuit Court could not have construed the course registration and the SFR together because the registration was not a contract. (Respondent's Br. at 24–25.) Respondent's argument is absurd on its face, as the course registration had all the requisite hallmarks of a contract, including the fact that students were required to click a confirmation button after adding their course selections to a "*Shopping Cart*" after agreeing via the SFR to be financially bound to pay by submitting registration. *See Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 244, 877 S.E.2d 486, 490 (Ct. App. 2022) (holding plaintiff bound to online contract where he clicked button to confirm). Moreover, the SFR and registration were executed for the same purpose—*i.e.*, to establish the parameters for which tuition and fees would be paid. (*See* C. Kelly Dep. Ex. 10 (SFR states 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." (emphasis added)).) Thus, the Circuit Court erred by not construing the two instruments together. *Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991); *see also, e.g.*, *Figueroa v. Point Park Univ.*, 553 F. Supp. 3d 259, 267 (W.D. Pa. 2021) ("Because the multi-faceted contractual relationship between a university and its students is generally not documented within a single integrated express writing, it is comprised of—and the courts look to—the many different representations provided to the students during their enrollment.").

Moreover, even without incorporation, the explicit reference in the SFR to the course registration at a minimum raises a jury question as to the contracting parties' intent as to whether the SFR incorporates the course registration's terms. Nothing in the SFR shows that the parties did not want to treat the course registration as part of their contract, which is what *Cafe Assocs.* requires for the court to exclude the course registration from consideration. Indeed, while the trial court found the SFR embodies the entire agreement of the parties, the SFR does not contain an integration clause. Hence, the course registration is just as much part of the parties' contract as the SFR. *See RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct. App. 1984) (absent integration clause, consistent parol agreements not intended to be merged with final agreement are enforceable). The Circuit Court therefore erred by ignoring evidence of the parties' intent, favoring the moving party's factual interpretation of same, and by concluding, as a matter of law, that the two instruments are separate and that only the SFR constituted the contract between the parties.

B. Issues of Material Fact Regarding the Parties' Intent Precludes Summary Judgment.

USC tacitly concedes (as it must) that ambiguous contract terms should be submitted to the jury, yet it argues that the SFR was not ambiguous, so there was no question about the Parties intent. (Respondent Br. at 26–27.) First, this argument relies on the premise that the Circuit Court did not err when it refused to construe the course registration and SFR together. As discussed above, that was in error, and this Court should reverse for that reason alone.

Moreover, Appellants explicitly selected face-to-face instruction as the instructional method when signing up for classes—a fact not in dispute. They testified at deposition that they considered receiving face-to-face instruction to be a crucial part of their agreement with the university. (Bunch Dep. at 117:1–7 ("I entered into an agreement with the University of South

Carolina to pay for classes that I registered [for] and I registered for face-to-face classes.").) And USC itself recognized that students "have an expectation that the class will be taught **in the method** that is specified in Self-Service Carolina." (University of South Carolina, COVID-19 Faculty Guidance, COVID-19 faculty guidance for Fall 2022 semester, Updated August 4, 2022 (emphasis added).) Indeed, only a dean of the university can grant permission to change the instructional method. *Id.* All this evidence, which the circuit court ignored, at the very least makes reasonable an inference that the contract includes as a material term the face-to-face instruction that Appellants explicitly selected. USC's reliance on the 60-year-old *Proffitt* case is unavailing because it did not involve a situation like this one, where the written contract incorporated by reference other terms contained outside the contract. *See Proffitt v. Sitton*, 244 S.C. 206, 213, 136 S.E.2d 257, 260 (1964).

Additionally, the trial court improperly decided contested factual issues when it found that USC's boilerplate disclaimer in its academic bulletin that it "reserve[d] the right to make changes in curricula, degree requirements, course offerings, or academic regulations at any time" meant USC had no obligation to offer any specific classes in any specific manner. (Op. at 13.) Critically, "whether a section of a catalogue or bulletin is part of an implied contract between a student and a university 'center[s] around what is reasonable' and is 'generally a question of fact.'" *In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig.*, No. CV204066DMGPVCX, 2021 WL 3560783, at *4 (C.D. Cal. Aug. 6, 2021). USC argues that "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." (Respondent's Br. 31.) But this argument regarding a matter of disputed material fact illustrates the error in the Circuit Court's reasoning,

which construed the facts in the light most favorable to USC, while ignoring the following reasons the purported disclaimer was irrelevant.

First, and most obviously, the bulletin itself expressly noted that the disclaimer "is for information purposes only and **does not constitute any contractual agreement between a student and the University of South Carolina**." (MSJ Ex. N at USC_00001467 (emphasis added).) Second, although the trial court stated that the academic bulletin was provided to students during course registration in Self Service Carolina, the record evidence shows the opposite. *See* Bunch Depo. 252:25-253:1 ("I don't recall ever seeing this specific bulletin."). Nothing in the text of the bulletin itself shows that it was available through Self Service Carolina, nor did it contain a signature or acknowledgment page. (Def's Br. at 30, Ex. N.) Hence, the trial court made unsupported factual assumptions in favor of the moving party, which is the opposite of the summary judgment standard.

II. The Circuit Court Erred in Its Impossibility Doctrine Analysis by Deciding the Factual Question of Substantial Equivalence as a Matter of Law.

The trial court committed legal error in allowing USC to retain all of the tuition payment based on the impossibility defense. That is, even if successful, impossibility does not permit USC to *keep the money it received from Appellants*. The effect of the impossibility doctrine is to excuse both parties' performance, not just one side. *Meng v. New Sch.*, No. 23-CV-3851(JSR), 2023 WL 5162181, at *5 (S.D.N.Y. Aug. 11, 2023) ("[T]he remedy for impossibility, or its related and more applicable principle, frustration of purpose, is rescission of the contract. For this reason, TNS's impossibility defense would not relieve it of its obligation to return any portion of the tuition or fees plaintiff paid to which the university is not entitled.") (citation and quotation marks omitted); *Omori v. Brandeis Univ.*, 635 F. Supp. 3d 47, 57 (D. Mass. 2022) (same); E. Allan Farnsworth, Contracts § 9.9 at 642 (4th ed. 2004) ("The excused party's failure to perform because of

impracticability or frustration affects the other party's duties of performance in the same way as if the excused party had broken the contract."); Restatement (Second) of Contracts § 267 (party's failure to render performance may affect other party's duties even though failure to perform justified).

Notably, USC seemingly concedes that, even if it were successful in its impossibility defense, it would still be liable to return the portion of tuition and fees it collected for services not rendered. (*See* Respondent's Br. at 34.) Yet, USC argues that Appellants are nevertheless entitled no restitution, based on the Circuit Court's erroneous finding of fact—in the face of disputed evidence—that USC provided a substantially equivalent substitute. (*Id.* at 35.) However, as discussed in Appellants' Brief, the Circuit Court's finding of substantial equivalency in light of the disputed evidence was error, as the extent to which USC's substitute performance satisfied the contract is a question for the jury. *See Just Wood Indus., Inc. v. Centex Const. Co.*, 188 F.3d 502, 502 (4th Cir. 1999) (substantial performance a jury question). USC also argues that no restitution could possibly be awarded without straying into the forbidden zone of educational malpractice, but that is also false based on Appellants' arguments in its Brief and above—*i.e.*, the fair market value of the goods provided versus the goods contracted for can be ascertained without examination of the quality of the instruction. (*See* Appellants' Br. at 20–22.)

III. USC's Sovereign Immunity Arguments Fail.

The Circuit Court assumed for the sake of argument that Appellants "were correct that South Carolina law allows the State to implicitly consent to being sued by entering into contracts not covered by statutory authority" and found that sovereign immunity applied because there was no "express contractual promise to provide educational instruction and serves in person or in any specific modality." (Order at 26.) USC's arguments on appeal mirror this analysis and are inextricably intertwined with the merits of Appellants' breach of contract claim. (*See*

Respondent's Br. at 38–40 (attempting to argue that the State did not waive sovereign immunity because it supposedly reserved the right to make changes in course offerings and that the entire contract was contained in the Statement of Financial Responsibility.) Because the propriety of the Circuit Court's ruling with respect to sovereign immunity rises and falls with the merits of Appellants' claims, this Court should reverse for the reasons described above and in Appellants' Brief—*i.e.*, summary judgment on Appellants' breach of contract claim was improper because numerous issues of material fact exist including the Parties' intent in creating the registration contract, whether mode of instruction was a term, and whether Appellants suffered damages.

IV. USC's Acquiescence Arguments Fail Due to Undisputed Lack of Reliance.

The doctrine of acquiescence is an equitable doctrine that presents inherently factual questions that are inappropriate for adjudication at summary judgment, which USC does not dispute. Under the doctrine of acquiescence, "if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief." *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955).

Appellants here did not simply stand by and fail to object. *See* 23 Williston on Contracts § 63:9 (4th ed.) ("An intent to acquiesce or waive is essential to establish a waiver of a breach of contract, and the waiver must therefore be a voluntary, intentional relinquishment of a known right"). Moreover, USC never relied to its detriment on any decision by Appellants. There is no dispute USC would have switched to online instruction whether Appellants continued to remain enrolled or not. "[P]roviding classes and services to Plaintiffs"—*which they paid for*—and thereby allowing Appellants to earn credits and degrees is not detrimental reliance as USC suggests. (Respondent's Br. at 42.) Indeed, without some detrimental reliance by the University, the doctrine of acquiescence simply does not apply. *See Bauckman v. McLeod*, 429 S.C. 229, 245, 838 S.E.2d 208, 216 (Ct. App. 2019) (no estoppel based on acquiescence without showing of

detrimental reliance). At worst, the question whether USC detrimentally relied on Appellants' lack of objection is a question of fact for the jury—especially because the record contains countless complaints from other parents and students, which did not change USC's actions. (*See* Appellant's Br. at 10–11.) USC's does not meaningfully dispute the lack of detrimental reliance present here, destroying its acquiescence arguments.

V. USC's Arguments Concerning Appellants' Equitable Claims Fail.

As discussed in Section VII, *infra*, Appellants did not forfeit, waive, or abandon any arguments concerning their equitable claims. To the contrary, Appellants highlighted the numerous issues of fact that the Circuit Court erroneously construed in USC's favor—including most notably its conclusions that USC provided substantially equivalent substitute performance and that USC's retention of full tuition and academic fee payments after promising in-person instruction was not inequitable. (*See* Appellants' Br. at 25, 27.) Thus, for the reasons discussed above and in Appellants' Brief, the circuit court's opinion should be reversed with respect to Appellants' equitable claims.

VI. USC's Damages and Standing Arguments Are Premised on Disputed Issues of Material Fact that Must Be Construed in Appellants' Favor.

A. Appellants Suffered Damages By Not Receiving What They Bargained For.

Plaintiffs suffered a legally cognizable injury for standing purposes when the University breached its contract. That is, Plaintiffs were damaged by the University's unilateral switch to emergency remote teaching ("ERT"), that damage does not constitute a claim of educational malpractice, and Plaintiffs are entitled to prove those damages at trial. *See HIS Glob. Ltd. v. Trade Data Monitor, LLC*, No. 2:18-cv-01025, 2021 WL 2134909, at *12 (D.S.C. May 21, 2021) (granting summary judgment in plaintiffs' favor, finding defendant liable for breach of contract, but leaving for the jury the issue of damages, as it is "for the jury to decide the 'extent of the

breach,' i.e., the damages arising from [the defendants'] violations of the relevant contracts"). The facts that Plaintiffs still earned credits, improved their GPAs, and secured employment are immaterial to whether Plaintiffs were injured for standing purposes, as their injury was not receiving the product they bargained for. As Appellants explained in the Circuit Court and their Brief, a party is entitled to the benefit of their bargain, and receiving a different product is, by itself, a legally cognizable harm. (Appellant's Br. at 20–21.) As Appellants' expert opined, there is a tangible difference in market value between ERT and traditional in-person and online instruction, and the only way USC could prove that Appellants were not damaged would be by showing that the ERT it provided was substantially similar under the contract—a fact that is highly disputed and should appropriately be left for the jury. *See Just Wood*, 188 F.3d at 502 (substantial performance a jury question). Thus, material issues of fact exist regarding damages and, therefore, the Circuit Court must be reversed. *See HIS,* 2021 WL 2134909, at *12.

B. Appellants' Claims Are Not Based On The Quality of ERT or Educational Malpractice.

Only "subjective" claims are barred by the educational malpractice doctrine; "objective" claims are not. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 460-61, 578 S.E.2d 711, 716-17 (2003). Subjective claims are those alleging that students received "*deficient* academic services" or that they have "not received the *education* they ha[ve] been promised." *Id.* (first emphasis in original, second emphasis added). In contrast, objective claims are those based on a "specific promise to provide certain services" or that reference "specific services for which the [plaintiffs] allegedly paid and which [the university] allegedly failed to provide." *Id.* (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 411-12, 417 (7th Cir. 1992); *CenCor, Inc. v. Tolman*, 868 P.2d 396, 399-400 (Colo. 1994)).

Appellants' claims are clearly objective. There is a specific, "identifiable contractual promise that [the University] failed to honor in this case." *Hendricks*, 353 S.C. at 461. The University made specific, written promises during the registration process that it would provide face-to-face instruction and on-campus services, and then it failed to provide both during the second half of the Spring 2020 semester. The Circuit Court need not have delved into "the nuances of educational processes and theories" to resolve Appellants' claims. *Ross*, 957 F.2d at 411-12.

As Appellants have repeatedly explained, their claims have nothing to do with the quality of ERT. Rather, they simply argue that they contracted for one form of instruction and received another—the damages for which will be determined by a jury. *See, e.g., In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig.*, No. CV204066DMGPVCX, 2021 WL 3560783, at *3 (C.D. Cal. Aug. 6, 2021) (collecting cases) ("Courts addressing similar claims for COVID-19-related tuition refunds have concluded that California's educational malpractice doctrine does not bar claims that the university breached a specific promise of in-person classes and experiences.").

VII. USC's Forfeiture/Waiver/Abandonment Arguments Are Disingenuous and Meritless.

USC's scatters its brief with the argument that Appellants somehow "fail[ed] to preserve," waived, or abandoned several of the arguments raised on appeal. (*See* Respondent's Br. at 1–2 (Issue on Appeal No. 9.) For the Court's convenience, Appellants address all of these (meritless) arguments in this consolidated section.[1]

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[1] USC argues in a single conclusory statement that Appellants forfeited or abandoned an argument concerning "public policy weigh[ing] in favor of the students' argument on incorporating the registration screens into the Statement of Financial Responsibility." (Respondent's Br. at 2.) However, USC does not explain how Appellants forfeited or abandoned that argument, nor does it make that argument anywhere except its statement of the issues on appeal—rendering that argument *actually* abandoned. *See Glasscock Inc., v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (finding where an issue is not argued within the body of the brief but is only a short conclusory statement, the issue is abandoned on appeal); *Fields v.*

Nominal Damages. USC argues that Appellants forfeited their argument in favor of standing by not previously urging the Circuit Court to award nominal damages. (*See* Respondent's Br. at 21–22.) However, as Appellants previously noted, "[t]he law presumes the existence of at least nominal damages for the violation or infringement of a legal right." *Grooms v. Med. Soc. of S.C.*, 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989). Appellants therefore preserved their arguments in favor of nominal damages, at a minimum, by asserting the claims in the operative complaint and seeking legal and equitable damages. (*Compare* Sec. Am. Compl. At 16 ¶¶ 67, 90, 98 ("Plaintiffs . . . are legally and equitably entitled to damages, to be decided by the trier of fact in this action . . . ."), *with* Appellants Br. at 21 ("Appellants are entitled to have a jury determine if USC breached the contract and then to determine whether to award nominal damages . . . .")). USC's cases supporting forfeiture are inapposite. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (stating generally that a party cannot change their argument on appeal); *Foodbuy, LLC v. Gregory Packaging, Inc.*, 987 F.3d 102, 116 (4th Cir. 2021) (plaintiff sought only one specific form of relief that did not broadly include "damages[] to be decided by the trier of fact" like here). USC also argues that Appellants are barred from discussing nominal damages because they did not use the words "nominal damages" in their statement of issues on appeal. (*See* Respondents' Br. at 22.) While true Appellants did not mention "nominal damages" in its Statement of the Issues on Appeal, the argument clearly falls under Appellants' Issue No. 3: "Did the circuit court err in ruling that receiving a different service than bargained for did not

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Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 2003) (stating issues on appeal which are not argued in the brief are deemed abandoned and will not be considered by the appellate court).

constitute a legally cognizable harm?" (Appellants' Br. at 1); *see also Dunbar*, 356 S.C. at 142 ("A party need not use the exact name of a legal doctrine in order to preserve it . . . .").

Construing the Contract. USC argues that Appellants failed to previously raise and therefore forfeited their argument that the course registration and Statement of Financial Responsibility ("SFR") should be construed together. (Respondent's Br. at 24.) That is simply false. (*See* Plaintiff's MSJ Opp. at 7 (noting that "Plaintiff's execution of a Statement of Financial Responsibility . . . *expressly incorporates* their "course registration" into the terms of the contract" (emphasis in original)); *id.* at 9–10 (explaining the interplay between the course registration and SFR); *id.* at 27–28 (same).)

Foreseeing Consequences. USC argues that Appellants forfeited any argument that "the law does not require a contract to specify all of the consequences of breach as no drafter can foresee all future contingencies." (Respondents' Br. at 33.) This single-sentence assertion was not forfeited, as it was asserted in the context of an argument undisputedly preserved for appeal—*i.e.*, whether the Circuit Court erred in construing ambiguous terms in USC's favor. *See Dunbar*, 356 S.C. at 142 (no requirement that party use precise same words).

Maintaining Both Contract and Equitable Claims. USC argues that Appellants "abandoned" their challenge to the circuit court's "finding that they cannot maintain both breach of contract claims and equitable causes of action based upon the same facts." (Respondent's Br. at 43–44.) Not true. In fact, Appellants specifically argued—correctly—that "the parties dispute whether a contract for in-person classes ever existed" and that it would be premature to grant summary judgment on a promissory estoppel claim where a valid breach of contract claim exists yet remains unresolved. (Appellants' Br. at 28 n.3.)

Consideration of Consequences. Appellants argued in their Brief that the trial court should not have inferred the Parties' intent in USC's favor based on the speculation that USC might be unintendedly liable for more breach of contract claims in the future. (Appellants' Br. at 17.) Appellants noted that it was not the Circuit Court's province to consider the results of the Parties' competing interpretations at summary judgment because the Parties' intent is a question of fact for the jury. *See, e.g.*, *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, LLC, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) ("The determination of the parties' intent is [] a question of fact for the jury to determine."). USC now argues that Appellants forfeited that argument by not raising it prior to the Circuit Court's erroneous reasoning. (Respondent's Br. at 33.) This argument is meritless, and Appellant's observation was asserted in the context of an argument undisputedly preserved for appeal—*i.e.*, whether the Circuit Court erred in construing ambiguous terms in USC's favor. *See Dunbar*, 356 S.C. at 142.

Construing Facts in Appellants' Favor on Equitable Claims. USC argues that Appellants are barred from arguing that "the circuit court failed to construe the facts of unjust enrichment in the light most favorable to them" because Appellants did not file a motion to alter or amend judgment following the order granting summary judgment. (*See* Respondent's Br. at 44.) The case USC cites in support, however, merely holds that Rule 59(e) is an optional step a party "*may*" take where "she believes the court has misunderstood [or] failed to fully consider" an argument, and it is only required to preserve appellate review "when an issue or argument has been raised, but not ruled on." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). Here, the Circuit Court considered the issue, but incorrectly applied the summary judgment standard—which is not the type of infirmity that requires a Rule 59(e) motion to preserve appellate review. *See id.*

CONCLUSION

For the foregoing reasons and those set forth in Appellants' Brief, Appellants respectfully request that the Court reverse the circuit court's decision granting summary judgment as to Appellants' breach of contract, promissory estoppel, and unjust enrichment claims, and remand for further proceedings.

DATED: January 3, 2025

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The Honorable Jocelyn Newman, Circuit Court Judge

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Appellate Case No.: 2024-000291

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

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CERTIFICATE OF SERVICE

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