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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable Roger M. Young, Sr., Circuit Court Judge

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2026-000964
Case No. 2020-CP-10-02357

Lysandra Serrano, Savannah Mckenzie, Cassandra Aungst, Sydney Brown, Ryan Coughlin, individually and on behalf of others similarly situated, Appellants,

v.

Charleston Southern University, Respondent.

INITIAL BRIEF OF APPELLANTS

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Dated: July 17, 2026

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STATEMENT OF THE CASE

This case has a lengthy procedural history given Respondent was in default for almost two years. Below is a chronology of the relevant various pleadings filed in this case both in state and federal court.

Appellants filed their Summons and Complaint in the Charleston County Court of Common Pleas on May 28, 2020. (R. ___). Respondent accepted service of the Complaint. (R. ____). On July 24, 2020, the date Respondent's answer would have been due, Respondent removed to federal court on July 28, 2020. (R. ___).

After removal on August 3, 2020, CSU filed a Motion to Dismiss in federal court. On August 12, 2020, the district court entered an Order expanding Appellants' time to respond to CSU's Motion to Dismiss "until 14 days after the Court issues an order on Plaintiff's forthcoming motion to remand…." (R. ___). The district court further ruled that "[i]f the [district court] does not remand this case, [Respondent's] pending motion to dismiss will be moot but [Respondent] may file a motion to dismiss in state court." *Id.* (R. ____).

On August 17, 2020, Appellants filed the First Amended Complaint. On August 21, 2020 Appellants filed a motion to remand the case back to state court. On August 28, 2020, Appellants and Respondent filed a Consent Motion for Extension of Time to Respond to the Appellants' Amended Complaint seeking leave for Respondent to respond to Appellants' Amended Complaint within ten (10) days following the issuance of an Order on Appellants' Motion to Remand.

(R. ___). On September 2, 2020, the district court entered a text order granting the Consent Motion for an Extension of Time to answer, stating "[Respondent] answer is due ten (10) days following the issuance of an Order on Appellants' Motion to Remand." (R.___).

On February 18, 2021, the district court granted Appellants' request to remand the matter back to state court. Also on February 18, 2021, federal clerk Virginia Druce emailed the remand order to Charleston Clerk of Court Julie Armstrong. (R. ____). After sending the email, Druce mailed a certified copy of the remand order to the Charleston clerk of court's office as evidenced by both Druce's email and the federal docket report. (R. ___) and (R.____). Judge Henricks' Order remanding the case back to state court was filed in state court with stamp "Julie Armstrong Clerk of Court" at 2:40pm on February 18, 2021. (R. _____). Two months later, after Respondent failed to file an answer, Appellants filed a Request for Entry of Default pursuant to Rule 55(a) on April 20, 2021. (R. ____). On June 21, 2021, the Honorable Judge Young granted Appellants' request and ordered entry of default. (R. _____). On June 28, 2021, Respondent filed a motion to set aside the default. (R. ____). On December 29, 2021, Appellants filed their memorandum in opposition.

On January 3, 2022, Defendant withdrew its initial motion to set aside entry of default. (R.___). On January 6, 2023, Respondent filed a Motion for Relief from Void Entry of Default, Void Order(s), and Void Proceedings, or, in the alternative, Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the alternative, renewed Motion to Set Aside Entry of Default. (R. ___). The same day Respondent filed a Motion to Dismiss Appellants' First Amended Complaint, an Answer, and Motion for Continuance of the Class Certification Hearing.

On March 6, 2023, Appellants filed a Memorandum in Opposition to Respondent's Motion for Relief from Entry of Default, or in the alternative, Motion to Dismiss. (R. __). Respondent filed its Reply on March 14, 2023. (R. __). On March 27, 2023, the Honorable Judge Young entered an Order Setting Aside Default Entered Against Respondent. (R. ___). On April 6, 2023, Appellants filed a Motion for Reconsideration, which was denied on April 7, 2023. (R. ___).

On October 2, 2024, Appellants filed a Consent Motion to Amend Complaint, which was granted on January 29, 2025. Appellants filed their Third Amended Complaint the same day. (R. ___). On February 13, 2025, Respondent filed its Answer. (R. ___). On April 28, 2025, Respondent filed its Motion for Summary Judgment. (R. ___). On August 26, 2025, Respondent filed its Amended Motion for Summary Judgment. (R. ___). Its 48-page Memorandum in Support of Motion for Summary Judgment was filed on August 29, 2025. (R. ___). Appellants' Response in Opposition was filed the same day. After a hearing on September 5, 2025, the Honorable Judge McCoy granted summary judgment on January 9, 2026. (R. ____). Appellants filed a Motion for Reconsideration on January 19, 2026, which was subsequently denied. (R.___). This appeal now follows.

FACTS

During the Spring Semester 2020, the whole world was impacted by the Covid-19 virus. Many businesses, schools, churches and other public spaces closed in an effort to contain the pandemic. Respondent was one such school that closed its campus during this time.

Respondent operates its campus by offering two paths for students. They can either enroll as online only students or full-time traditional students.[1] Appellants were all enrolled as full-time traditional students for the Spring 2020 Semester. Respondent charges a flat rate of $13,000 per semester in Spring 2020 for full-time traditional students as opposed to $490 per credit hour, or roughly $7,350 for 15 hours for online only students in Spring 2020. (R.___). Additionally,

[1] "Full-time traditional" is the term Respondent uses on its website, internal documents, and other communications to describe students enrolled as full-time on-campus students as opposed to online-only students.

Appellants were all residential students in Spring 2020 paying between $5,200 and $6,000 per semester for room and board. (R. ___).

Appellants initiated this lawsuit not because they wanted to force Respondent to remain open, but because Appellants seek a refund for housing, meals and the on-campus experience for which they paid but did not receive during the campus closure. Respondent closed its campus, including dorms and cafeterias, for approximately 48% of the Spring 2020 semester due to COVID-19 but failed to fully refund Appellants.[2]

Despite initial concerns, Respondent came out of the pandemic not only unscathed financially but with an increase in its financial reserves. On May 15, 2020, Respondent had projected a budget shortfall of $356,740 for fiscal year 2019-2020; in actuality, it enjoyed a budget surplus of $1,449,954 for fiscal year 2019-2020. (R.___). From 2019-2022, Respondent kept a total of $8,773,061 in CARES Act institutional aid to Respondent plus $705,679 in School Infrastructure Programs. (R. ____). Respondent's endowment grew $490,818 from January to September 2020. (R. ____). In fact, Respondent recognized it would likely receive federal stimulus funds that would equal the amount owed to students as a refund for room and board. (R. ___). Yet, Respondent failed to refund students for room, board and the full-time traditional student experience for which they had paid, but Respondent could not deliver.

Room and Board Costs

Appellants seek a full refund for 48% of the amounts paid pursuant to the Housing Contract for the Spring 2020 semester in which the dorms and cafeterias were closed. For the Spring 2020 Semester, Respondent charged between $5,200 and $6,000 for room and board, for a total room and board charge of $5,688,200. (R. ____).

[2] Appellants determined Respondent was closed for approximately 48% of the Spring 2020 Semester by calculating the dates pursuant to Respondent's semester calendar.

The Housing Contract expressly provided housing accommodations would be available throughout the academic semester and entitled eligible students to an on-campus housing assignment. (R. __). Appellants paid the full amount for room and board before moving in for the Spring 2020 Semester as required under their Housing Contracts. (R. ___).

Respondent closed its campus on March 18, 2020.[3] Despite locking the dorms and closing the dining halls, Respondent declined to provide Appellants with full refunds for the remaining portion of the Spring 2020 Semester.

Full-Time Traditional Students Tuition Costs

Similar to the Housing Contract, Plaintiffs also entered into a contract with Respondent as full-time traditional students for the Spring 2020 semester ("Tuition Contract"). This Contract is documented in the student handbook, the Manual of Academic Policies & Procedures on the Registrar's website as well as the syllabus that outline the terms of the agreement between Respondent and Plaintiffs. (R. ___). When a student enrolled at Respondent for the 2019-2020 academic year, the student accepted financial responsibility for paying tuition as set forth in an online document the student would accept by clicking "yes." (R. ___). Specifically, the Financial Responsibility document acknowledged that by registering for courses at CSU, the student was "obligated to pay tuition, fees and related expenses." *Id.* Further, the student accepted "full financial responsibility for each registered course." *Id.* Finally, the Financial Responsibility document also incorporated Respondent's policies and procedures, catalog and student handbook. *Id*.

The Manual of Academic Policies & Procedures applicable to the Spring 2020 semester,

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[3] The trial court's order found that Respondent closed its resident halls on April 1st, but that is the date Respondent began the move-out process where students could come back to campus and retrieve their things. The March 15, 2020 email from John Wilson enclosing the Campus Update notified students that all residence halls would close on Wednesday, March 18 at 3pm. (R. ____).

includes the following:

> … [Respondent] **serves**…two different kinds of students: the traditional students who take most of their courses in campus classrooms, and the online students who are a) enrolled in an online major and b) take the majority of their courses online….**[T]he academic leadership of the university believes and affirms that it is in the best interest of traditional students to take, when possible, traditional face-to-face courses in non-accelerated formats. This allows for the building of greater community, the integration of faith, and a full exploration of the goals and outcomes of a given course in the great tradition of academic inquiry**.

(R. ___). In fact, the remainder of R-65, Enrollment in Online Courses, outlines the limitations and specific requirements for full-time traditional students to satisfy before enrolling in online courses. *Id.* Put differently, full-time traditional students could not freely enroll in online coursework and instead were required to obtain special permission to do so in certain circumstances. Respondent promoted the traditional full-time, on-campus model as the preferred educational experience, emphasizing the benefits associated with campus life and in-person instruction.

Respondent charges a flat rate of $13,000 per semester in Spring 2020 for full-time traditional students as opposed to $490 per credit hour, or roughly $7,350 for 15 hours for online only students in Spring 2020. (R.___). Importantly, all students—whether online or in-person—qualified for state and federal based merit scholarships such as Palmetto Fellows and the Pell Grant.[4] Likewise, Respondent provided endowment scholarships and institutional aid to both in-person and online students. (R.___).

Respondent boasts 50+ student organizations, 200+ events each year, convenient and

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[4] Federal Student Aid, *Student Eligibility for Pell Grants*, https://fsapartners.ed.gov/knowledge-center/fsa-handbook/2024-2025/vol7/ch1-student-eligibility-pell-grants (noting there is no limitation to qualifying for online only students); Palmetto Fellows Scholarship, *Initial Eligibility Requirements*, Palmetto Fellows Scholarship - che.sc.gov.

affordable dining and living options, campus ministries, Christian fellowship, and much more, all taking place on its 300-acre physical campus. (R. __). The campus itself has manicured landscapes, great libraries, state-of-the-art facilities, and a general sense of safety and peace. (R. ___). Respondent markets these on-campus experiences as benefits of enrolling as a full-time traditional student, noting Respondent's "vibrant campus is the perfect place to experience college life," providing a "biblical worldview." (R. ____). It is access to these experiences that students paid for, were deprived of, and now seek a refund for.

On March 11, 2020, Respondent announced it was cancelling all in-person classes and moving to online-only classes. (R. __). At approximately the same time, Respondent cancelled all in-person student activities, closed its libraries, laboratories, student centers, and recreational facilities. (R. __). On March 15, 2020, Respondent announced it was closing the campus to all students. (R. __). Beginning March 18, 2020, Plaintiff and the class members no longer had access to Respondent's campus and facilities, including computer labs, libraries, recreation centers, common areas, events, etc. (R. __). Further, other than to quickly collect their belongings on a scheduled date, Appellants lost all access to the residential hall and meal services for which they paid.

Importantly, all students—whether online or in-person—qualified for state and federal based merit scholarships such as Palmetto Fellows and the Pell Grant.[5] Likewise, Respondent provided endowment scholarships and institutional aid to both in-person and online students. (R. ___).

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[5] Federal Student Aid, *Student Eligibility for Pell Grants*, https://fsapartners.ed.gov/knowledge-center/fsa-handbook/2024-2025/vol7/ch1-student-eligibility-pell-grants (noting there is no limitation to qualifying for online only students); Palmetto Fellows Scholarship, *Initial Eligibility Requirements*, Palmetto Fellows Scholarship - che.sc.gov.

Jacqueline Fish, Respondent's Vice President of Academic Affairs testified that campus events (known as the Sweet 16 at Respondent), chapel, and ball games were all part of the campus experience that were shut down from March 18, 2020 through the end of the Spring 2020 semester. (R. ___). Dr. Fish also testified that the campus experience was part of why students chose to enroll at Respondent. (R. ___). Most importantly, **Dr. Fish testified that tuition charged full-time traditional students is for the entire educational experience that comes with being on campus and being in class with the professor and other students**. (R. ___).

Melanie G. Hilton, Director of Student Accounts for Respondent during Spring 2020, was asked what were full-time traditional students paying for when they were charged almost double the price per credit hour than online only students. Hilton's responded the ability "take classes on campus" and for the ability to be on campus. (R. ___).

Board member Judith Kneece Hetz testified that Respondent markets its "community" and said that part of Respondent's appeal is its "Christian atmosphere." (R. ___). Board member Larry Driggers testified that full-time traditional students pay more per hour than online students because "online students are home and they're not on campus." (R. ___). Likewise, Respondent's current President, Keith Faulkner, admitted that full-time traditional students are charged a premium for the experience and Christian environment not afforded to online-only students. (R. __). Had these full-time traditional students wanted an online-only experience, their tuition charge would have been less per credit hour. They paid for something different, and they did not receive it.

In sum, Respondent promoted and marketed the value of attending the university as a full-time traditional student immersed in an on-campus Christian environment and charged students accordingly for that experience during the Spring 2020 semester. When Respondent closed its campus in response to the COVID-19 pandemic approximately halfway through the semester, however, it ceased providing the very on-campus experience for which students had paid yet refused to refund the corresponding portion of those payments. Likewise, once the campus closed, Respondent could no longer provide Appellants with access to campus housing and dining services but failed to fully[6] reimburse students for the unused portion of their room-and-board payments. Appellants, individually and on behalf of all other Class members, seek the entry of an Order requiring Respondent to refund the pro-rated, unused portion of tuition and room and board as well as tuition.

STANDARD OF REVIEW

Grant of Defendant Charleston Southern University's Motion to Set Aside Default

The decision whether to set aside an entry of default lies solely within the sound discretion of the trial court. *Roberson v. Southern Finance of South Carolina, Inc. citing Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989). However, if the trial court's decision represents a clear showing of an abuse of that discretion, the trial court's decision will be overturned. *Id.* "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions is without evidentiary support.'" *Id. citing In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997). Where there is no evidence to support the trial court's determination as to a default judgment, the trial court's ruling is an abuse of discretion and must be set aside. *Id.* Where the trial court's decision as to a default judgment is based on an error of law, or when based upon factual conclusions without evidentiary support, the trial court has abused its discretion. *Vander Toorn v. Billeter Recruiting, LLC*, 2025 WL 3720719 at *1 (Ct.App. December 23, 2025) *citing Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888

[6] Respondent provided partial refunds to Appellants, which at most totaled a flat $1,482 less any financial aid their received, representing much less than the 48% of the total for room and board they paid for Spring 2020. (R. ___).

(2009).

Because removal proceedings infringe on a state court's jurisdiction, "removal statutes must be strictly construed, and any doubts are to be resolved in favor of state court jurisdiction and remand. *Limehouse v. Hulsey* 404 S.C. 93, 106, 744 S.E.2d 566, (S.C. 2013) citing *Brierly v. Alusuisse Flexible Packaging, Inc.,* 184 F.3d 527, 534 (6th Cir.1999); *Gaus v. Miles, Inc.,* 980 F.2d 564, 566 (9th Cir.1992) (Federal jurisdiction must be rejected if there is any doubt). Applying this standard, the trial court's ruling should be reversed and the entry of default against Respondent should be upheld.

Grant of Summary Judgment in Favor of Defendant Charleston Southern

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56(c), SCRCP." *Graham v. Welch, Roberts and Amburn, LLP*, 404 S.C. 235, 238, 743 S.E.2d 860, 862 (Ct.App. 2013) *citing Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (S.C. 2009). A moving party is entitled to summary judgment only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non- moving party." *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). If a general issue of material fact exists then summary judgment should not be granted. Rule 56(c), SCRCP. "All ambiguities, conclusions, and inferences arising from the evidence <u>must be construed most strongly against the moving party</u>." *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155, 159 (Ct. App. 2005) (emphasis added); *citing Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct.App. 2003); *Baley v. South*

Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App. 2001). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is a disagreement concerning the conclusion to be drawn from those facts. *Id. Citing Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000).

Where the evidence is susceptible to more than one reasonable inference, summary judgment must be denied. *Vaughn v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly denied a trial on disputed factual issues. *Id. citing Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004). The burden is not on the plaintiff to prove its case at the summary judgment phase but rather to show that there is at least a genuine issue of material fact, which can mean simply a disagreement concerning the conclusion to be drawn from accepted facts.

ARGUMENT

Appeal of the Order Setting Aside the Entry of Default

A. State court jurisdiction is reinstated pursuant to 28 U.S.C. § 1447 (c) after a <u>mailing</u> of the certified remand order and it was an abuse of discretion to find otherwise.

Removal of a matter from state court to federal court "suspends" the state court's jurisdiction. *Limehouse*, 404 S.C. at 105, 744 S.E.2d at 573 (S.C. 2013). The question before the Court is when does the suspension of state court jurisdiction lift upon remand? The trial court incorrectly found that jurisdiction is lifted upon the <u>filing</u> of the remand order in state court as opposed to the mailing of the certified remand order by the federal clerk.

The lower court's decision misinterpreted the clear and unambiguous language of the applicable statute. 28 U.S.C. § 1447 (c) requires that after remand, "[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State Court" and " [t]he State court may thereupon proceed with such case." 28 U.S.C. § 1447 (c). The word "file" does not appear in 28 U.S.C. § 1447 (c). *Id.* There is no requirement by the federal statute for the filing of the certified copy to trigger state court jurisdiction. *Id.*

By comparison, the word "file" does appear in the federal statute divesting the state court of jurisdiction upon the removal motion.

> … shall **file** a copy of the notice with the clerk of such State court, which shall effect the removal **and the State court shall proceed no further** unless and until the case is remanded.

28 U.S.C. § 1446 (d) (emphasis added). In contrast, 28 U.S.C. § 1447 (c) does not use the word "file" but instead merely requires that the federal district clerk **mail** a certified copy. Construing the removal statutes strictly in favor of state court jurisdiction, the triggering event to reinstate state court jurisdiction is simply the ***mailing*** of the certified remand order, which, as described in the below section occurred in this instance.

Removal proceedings encroach upon a state court's jurisdiction, and, as a result, removal statutes must be strictly construed. *Limehouse*, 404 S.C. 93, 106, 744 S.E.2d 566, 573 (S.C. 2013)*citing Brierly v. Alusuisse Flexible Packaging, Inc.,* 184 F.3d 527, 534 (6th Cir.1999); *Gaus v. Miles, Inc.,* 980 F.2d 564, 566 (9th Cir.1992). The United States Supreme Court has explained:

> The removal statute[,] which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104, 61 S.Ct. 868, 85 L.Ed. 1214 (1941). The trial court in its ruling determined that the strictly construed requirement only applied to the actual removal of the action to federal court and not to the remand back to state court. However, *Limehouse*, a case concerning only the remand back to state court, made no such distinction.

Limehouse, 404 S.C. at 105, 744 S.E.2d at 573 (S.C. 2013).

Limehouse is the most recent S.C. appellate case to discuss the issue of when a state court's jurisdiction is reinstated after a removal and subsequent remand. *Limehouse*, 404 S.C. 93, 744 S.E.2d 566, (S.C. 2013). In *Limehouse*, unlike this case, there was no evidence that the federal district court clerk had in fact mailed the certified remand order to the state clerk of court. *See generally Id.* Rather, *Limehouse* wrestled with whether jurisdiction reinstated in state court upon the mailing of the certified remand order OR when the remand order was entered in federal district court. *Limehouse*, 404 S.C. at 102, 744 S.E.2d at 571 (S.C. 2013). *Limehouse* recognized there was support for both positions by the Court of Appeals as well as the federal and state courts. However, *Limehouse* ultimately decided that without evidence of a certified remand order, jurisdiction did not resume in state court. *Id.* 404 S.C. at 109, 744 S.E.2d at 575 (S.C. 2013).

Nowhere in *Limehouse* is there a requirement that the certified remand order be ***filed*** in state court prior in order to trigger the resumption of state court jurisdiction.

Limehouse confusingly references "receipt" of the certified remand order multiple times in its decision while also affirming 28 U.S.C. § 1447 (c) triggers jurisdiction "upon the mailing of the order by the clerk of the district court." However, *Limehouse* includes the following reasoning, which specifies that the mailing is the jurisdictional event:

> …Congress purposefully included the mailing of a certified order as a jurisdictional requirement and, thus, the mere entry of an order is not self-executing as to the jurisdiction of the state court. *See Arnold v. Garlock, Inc.,* 278 F.3d 426, 437–38 (5th Cir.2001) ("A § 1447(c) order of remand is not self-executing ... This provision creates *legal significance* in the mailing of a certified copy of the remand order in terms of determining the time at which the district court is divested of jurisdiction. On that basis, the federal court is not divested of jurisdiction until the remand order, citing the proper basis under § 1447(c), is certified and mailed by the clerk of the district court." (emphasis added) (citation omitted)). **We believe the reasoning for this inclusion is sound.** (emphasis added)

Limehouse, 404 S.C. at 107-108, 744 S.E.2d at 574. The clear and unambiguous language of 28 U.S.C. § 1447 (c) triggers jurisdiction upon the mailing of the remand order by the federal clerk of court and such language must be strictly construed.

In analyzing legislation, the judiciary will give words their plain and ordinary meaning and will not resort to subtle or forced construction that would limit or expand the statute's operation. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (S.C. 2008); citing, *Sloan v. S.C. Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 469, 636 S.E.2d 598, 607 (S.C. 2006) (overruled on other grounds). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that the language must be construed in light of the intended purpose of the statute.'" *Id.*; *citing, Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (S.C. 2000). Had Congress desired for state court jurisdiction to be reinstated at the time of receipt or filing of a certified order, it could easily have included such language in the statute.

Appellants provided the Court with the affidavit of Virginia Druce, the federal clerk of court who affirmed via signed and notarized affidavit that she had in fact mailed the remand order to the Charleston Clerk of Court. (R. ___). That affidavit satisfies the requirement of 28 U.S.C. § 1447 (c).

Further, Appellants directed the trial court to the federal docket, which included language specifically noting that the remand order was emailed *and* mailed to the Charleston County clerk of court. (R. ___). The fact that the certified remand order was mailed to the Charleston County Clerk of Court is dispositive of the issue of state court jurisdiction.

The remand order, although not in a certified format, was filed in Charleston County Court by the clerk of court on February 18, 2021, the same day it was issued by Judge Hendricks.

(R.____). It is impossible to know exactly what happened after Federal Clerk of Court Druce mailed the certified remand order to the Charleston County Clerk of Court on February 28, 2021. During February and March of 2021, much of the state and indeed, the Charleston County Courthouse remained open only in a very limited capacity due to the ongoing Corona Virus Pandemic. Did an employee of the Charleston County Clerk's office discard the certified remand order because the remand order was already filed as of February 18, 2021? Likely we will never know what happened to the certified remand order once it arrived in the Charleston County Clerk's office. However, there is no admissible evidence to dispute the Federal District Court's affidavit.[7] It is undisputed that Druce mailed the certified remand order on February 28, 2021, and thus triggered the jurisdiction event pursuant to a strict reading of 28 U.S.C. § 1446 (d).

For the trial court to essentially discredit and ignore Druce's affidavit and the entry on the federal court docket, is an abuse of discretion that must be reversed. Jurisdiction resumed as of February 18, 2021 when the federal clerk mailed the certified order.

B. Respondent waived its right to raise the question of the certified order by not raising it until two years after the remand order was issued.

The trial court rejected the notion that Respondent waived its objection to jurisdiction by not raising it sooner and instead generally participating in the litigation – by participating in discovery, filing a motion to set aside default without raising a question as to the existence of a certified remand order, and participating in mediation. The trial court based its decision on a finding that subject matter jurisdiction cannot be waived. (R. ___).

However, this ruling ignores the analysis of *Limehouse*, which held that the state circuit court "had subject matter jurisdiction" over the claims and acquired personal jurisdiction over the

[7] Respondent submitted an affidavit of an attorney Jane Stiegman, Esq. offering up hearsay that she had spoken to an employee of the Charleston County Clerk's office who assured her that all mailings received were filed. This affidavit is inadmissible with regard to what the employee told Ms. Stiegman as it violates the hearsay rules.

parties upon the filing and service of their pleadings. *Limehouse*, 404 S.C. at 105-106, 744 S.E.2d at 573 (S.C. 2013). Specifically, *Limehouse* found that subject matter jurisdiction was not impacted by a removal to federal court. *Id.* Rather, only the state court's power to decide the case was impacted by the removal. *Id.* While Appellants assert based on the evidence that the certified order was properly mailed, even if the mailing did not occur, there is no authority to support the idea that such a jurisdictional issue cannot be waived, similar to the waiver of objections to personal jurisdiction. Our courts have routinely found that only subject matter jurisdiction cannot be waived, and as the *Limehouse* court explained, the issue here is not one of subject matter jurisdiction. *Id. and Paschal v. Causey*, 309 S.C. 206, 208-209, 420 S.E.2d 863, 865 (Ct.App. 1992) (finding that where subject matter jurisdiction is not involved, a party may waive their rights).

Respondent's failure to raise any concerns regarding the certified order, which could easily have been addressed in 2021 rather than 2023, constitutes a waiver of Respondent's rights to raise the issue as it relates to setting aside the entry of default. Respondent consented to the state court jurisdiction by filing the motion to set aside default on June 28, 2021. (R. ____). Further, Respondent sought a continuance of its motion. (R. ____). Importantly, Respondent continued for the next two years to participate in discovery including multiple depositions and mediation, yet at no time did Respondent raise any question about a certified remand order. (R. _____). Respondent's question as to the trial court's power or ability to hear and conduct the matter was waived by Respondent's failure to raise the issue and continue to participate in the state court proceedings.[8] *Id.*

[8] While Appellants are mindful that the defendant in *Limehouse* likewise did not raise the question of a certified order until after a trial on the damages, it is not apparent based on the *Limehouse* decision whether either party raised waiver by the defendant as grounds to find the state court could proceed in the absence of a certified remand order.

C. Respondent failed to establish good cause as to why it failed to answer or the *Wham* factors to the extent they should be considered.

Respondent has failed to establish "good cause" or why pursuant to SCRCP Rule 55(c) the setting aside of default would serve the interests of justice. Without any specific explanation, the trial court simply ruled that having reviewed Johnson's affidavit, it found that setting aside default serves the interest of justice and in essence Respondent had shown good cause. (R. ____). There was no specific description of what exactly the "good cause" that existed for set aside the default.

Respondent's attorney expressed confusion as to the date of Respondent's answer based on a motion to dismiss filed by Respondent while the case was pending in federal court. (R. ___). Respondent's position is that the motion to dismiss filed in federal court was sufficient to respond to the amended answer. However, Respondent's Consent Motion for Extension of Time to Respond to Plaintiff's Amended Complaint expressly requested an extension to answer and this filing was made <u>*after*</u> Respondent's motion to dismiss was filed. (R. _____). In response to the consent motion filed by both Respondent and Appellants, the federal court ruled, "[i]f the Court does remand this case, [Respondent]'s pending motion to dismiss will be moot but [Respondent] may file a motion to dismiss in state court." (R. ___). Respondent should have recognized by reviewing the federal court order, that the motion to dismiss filed in federal court was not a satisfactory answer to the amended complaint.

"[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct.App. 1988). Further, the "courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant" such that the negligence of an attorney is not sufficient to find good cause existed under SCRCP Rule 55(c). *Richardson v. P.V.,* *Inc.*, 282 S.C. 610, 682 S.W.2d 263 (2009); *citing Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct.App. 1987).

Respondent, almost two years after the case was remanded, claimed that good cause included the lack of a filed certified remand order in addition to the failure to recognize the need to file a new motion to dismiss or answer after the remand. (R. ____, R. ____). However, this cannot be the good cause pursuant to Rule 55(c) where it was not raised until almost a year and a half after the initial entry of default. Respondent cannot say the reason it did not answer Appellants complaint was because of a certified remand order when there is no evidence Respondent was concerned about a certified remand order until January 2023.

Further the trial court seems to attribute Respondent's good cause to some type of calendaring error, relying on the decision in *Jordan v. Hartford Fin. Grp., Inc.*, 435 S.C. 501, 507, 868 S.E.2d 400, 403 (Ct.App. 2021). (R. ____). However, the error in *Jordan* was one of mis-calendaring, while in this case, the error is a mistake as to the understanding of the law – namely whether the motion to dismiss filed in federal court would carry over to state court, which was specifically addressed in Henricks' Order dated August 12, 2020. (R. ____). Any claim that Respondent's good cause is based on the lack of a filing of the certified remand order does not suffice as this issue was not raised by Respondent until almost 18 months after the entry of default.

As Respondent has not put forth a good cause explanation and therefore there is no need for this Court to review the other Wham factors. Only "[o]nce a party has put forth a satisfactory explanation ... the trial court must also consider [the Wham factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Sundown Operating Co.*, 383 S.C. at 607-08, 681 S.E.2d at 888 (emphasis supplied). However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default. *Id.* citing *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995).

In analyzing the *Wham* factors, Appellants suffered prejudice by lengthy default period where the matter remained in default for a year and a half before Respondent raised questions regarding the certified remand order. As described extensively in Johnson's affidavit, the parties participated in significant discovery, conducted depositions and held multiple mediations all with the understanding the default was entered. (R. ___). Appellants moved forward while Respondent repeatedly sought continuances for the hearing on the hearing of its original motion to set aside default. (R. __).

In summation, Respondent has not provided a good cause explanation for relief from default and the trial court in its order failed to describe any such good cause. The failure to do so is an abuse of discretion and the trial court's order set aside default on the basis of good cause shown and the *Wham* factors should be reversed.

APPEAL OF THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT

This is the summary judgment stage of the case and not the full trial of the matter. The burden rests on Respondent to show that there is no genuine issue of material fact. Further, all questions of fact are to be construed in Appellants favor. The trial court issued a 30 page order analyzing multiple competing facts always in favor of Respondent versus Appellants. Such analysis is error and does not comport with the standard for summary judgment. The trial court is tasked with determining whether Respondent can show that there are no questions of material facts upon which Appellants can succeed. As set forth below, Respondent has failed to carry its burden and the trial court has failed to consider the facts in the light most favorable to Appellants.

A. The lower court misconstrues the concept of impossibility to bar Appellants' claims of breach of contract because the defense of impossibility does not excuse restitution and Appellants are not seeking specific performance by Respondent.

Assuming contracts existed requiring Respondent to provide room and board as well as an on-campus experience, the trial court excuses the refunds sought by Appellants by finding Respondent's performance was impossible due to the threat of the Covid 19 Pandemic. (R. ____). Impossibility as a defense is to be narrowly construed and rarely applied. *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987). Assuming Respondent's ability to provide room and board as well as an on-campus learning experience in this instance was in fact impossible, that does not end Appellants' claims and right to recovery. Appellants are not trying to enforce the performance of the contracts. Instead, Appellants seek a refund from Respondent for the Respondent's failure to provide the agreed upon room, board and access to the on-campus experience. While Respondent's performance may be excused pursuant to the doctrine of impossibility, Respondent's required refund to Appellants, or restitution, is not excused.

In *Facto v. Pantagis*, plaintiffs were entitled to recover the money they prepaid for a wedding reception, which was cancelled due to a power failure, which under the force majeure clause of the contract relieved the banquet hall of the obligation to provide the reception. 390 N.J. Super. 337, 915 A.2d 59 (App. Div. 2007). It is generally held that where either performance or further performance is excused by reasons of supervening impossibility, the excused party is liable to the other party for what the latter has paid or done under the terms of the contract, less the value of anything the other party has received. 17 Am.Jur.2d Contracts § 652. The Restatement (Second) of Contracts § 377, which has been widely accepted and cited to in general in this state requires that "[a] party whose duty of performance…is discharged as a result of impracticability of performance…is entitled to restitution for any benefit that he has conferred on the other party by way of part performance… [f]urthermore, in cases of impracticability…the other party…is also entitled to restitution."

To apply the doctrine of impossibility to perform a contract in the manner suggested by Respondent, would allow any performing party to partially perform yet keep the entire consideration for the contract despite the fact that the obligations remain unfinished. That cannot be the law. Under Respondent's theory, a party could hire a painter to paint a house, pay the full contract price but be stuck with losing that money if the painter falls off a ladder halfway through the project and is unable to complete painting the house. Impossibility does not shift the burden to the party who has completely fulfilled their obligation under the contract – in this case fully paid for the contracted services -- when the other party finds it impossible to complete their own contractual duties.

This is exactly what Respondent proposes, arguing at the summary judgment hearing that it was reasonable for Respondent to withhold refunds from students because it would be a much smaller impact on the students versus the school. Counsel for Respondent presented:

> If [Respondent] took the risk that if the students had to leave their housing they would all get refunded, that's a multi-million dollar risk the school will be taking. But what [Respondent did] is spread out over the individual thousands of students so it is a much smaller impact on the students, and that is a reasonable economic decision for a landlord to make.

(R. ___). In other words, because a room and board refund for the time period in which Respondent did not provide room and board due to the pandemic would amount to millions of dollars refunded to students, Respondent decided it would be much less impactful for Respondent if individual students did not receive full refunds. This cannot be the result.

Appellants seek to receive a refund where they have paid the full consideration due under the contract, not enforce the performance of the contract. Respondent does not argue or present any claim that it would be impossible for Respondent to pay such a refund. In fact, as described in the quote above from Respondent's counsel, Respondent has the funds for the refund but simply thought it more financially prudent to not repay the students. The doctrine of impossibility does not limit Appellants' claim for restitution.[9]

B. The lower court erred in finding that there is no genuine issue of material fact as to whether Respondent breached the Housing Contract by failing to issue refunds.

It is undisputed that a Housing Contract existed between Respondent and Appellants entitled "Charleston Southern University 2019-2020 University Student Housing Contract" addressing both housing for Appellants and food services. (R. ___ and R. ___). Appellants paid the amounts required pursuant to the Room and Board Contract in order to receive the ability to reside in the dorms and eat at the Respondent cafeterias or other food services for the entire Spring 2020 Semester. *Id*. As of March 18, 2020, both the dorms and cafeterias became unavailable to Appellants. (R. ___). Respondent admits it did not provide Appellants with the full refund representing the portion of the Spring 2020 Semester in which Respondent closed its dorms and cafeteria. (R. ___), (R. ___). Respondent admits that providing a full refund to students for housing would be a multi-million dollar endeavor, which it chose not to do. (R. ___). Respondent claims that it passed along "Respondent's savings for meals" and thus Appellants have not suffered any damages under the contract as it pertains to the meals, but Respondent does not assert that it refunded Appellants for the portion of the Spring 2020 Semester where food services were not offered. (R. ___). Passing on "savings" rather than the amount Appellants paid does not constitute a refund.

In its simplest form, Appellants have shown there was a contract, Appellants paid the

[9] Respondent does not argue that it is impossible to repay the refund, but if it did so, *Morin v. Innegrity, LLC* makes clear that claimed financial inability to perform cannot constitute impossibility. 424 S.C. 559, 570, 819 S.E.2d 131, 137 (Ct.App. 2018).

required consideration pursuant to the contract, Respondent, either through impossibility or otherwise, did not provide the services it agreed to provide and Respondent admits it did not provide a full refund to Appellants for the time period in which it did not provide the contracted for services. The analysis for summary judgment could end there. However, the trial court erroneously found that Appellants failed to show a genuine issue of material fact existed as to whether Appellants were entitled to a refund under these circumstances requiring an in-depth analysis of the Housing Contract.

1. The Housing Contract is a contract of adhesion and must be interpreted with this fact in mind.

The Housing Contract is a classic contract of adhesion. The very title of the Housing Contract -- "Charleston Southern University 2019-2020 University Student Housing Contract" indicates that it was a form contract provided in the same form to all students who wished to reside on campus for the 2019-2020 academic year. The Housing Contract is the same for all Appellants with the exception of their selecting a Room and Board tier. (R. ___).

"Under the general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007) *citing Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are agreements in which one party has virtually no voice in the formation of the contract terms and language. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct.App. 1998). A contract that cannot be edited by one party is a contract of adhesion. *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 596, 910 S.E.2d 474, 477 (S.C. 2024).

In footnote 17 of its Order, the trial court found the Housing Contract was not a contract of adhesion because on-campus housing was not mandatory for Appellants, and that Appellants, who were "well-educated, accomplished young adults who were close to graduation – were free to walk away from signing the contract…." (R. ___). However, this ruling ignores the definition of a contract of adhesion. "A contract of adhesion is a contract where an offeree is faced with two choices: complete adherence or outright rejection." *Lackey* 330 S.C. at 394, 498 S.E.2d at 901 (Ct. App. 1998*) citing Wingard v. Exxon Co.*, 819 F.Supp. 497, 503 (D.S.C. 1992) *(citing* E. Allen Farnsowrth, *Contracts* § 4.26 at 295 (1982)). Thus the fact that Appellants could have walked away and lived in an apartment instead of on campus does not mean the Housing Contract is not a contract of adhesion. Thus, reviewing the facts in the light most favorable to Appellants, the Housing Contract is a contract of adhesion and it is error for the trial court to find otherwise.

"Adhesion contracts, however, are not per se unconscionable." *Simpson,* 373 S.C. at 27, 644 S.E.2d at 669. "Therefore, finding an adhesion contract is merely the beginning point of the analysis." *Id.* "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 24–25, 644 S.E.2d at 668; *see also Fanning v. Fritz's Pontiac–Cadillac–Buick, Inc.,* 322 S.C. 399, 472 S.E.2d 242 (1996) (same). In short, a challenged contractual provision in an adhesion contract is examined to determine whether it is unconscionable due to both (1) an absence of meaningful choice and (2) oppressive, one-sided terms. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

If Appellants wished to reside on campus, they had no choice but to execute the Housing Contract. They couldn't negotiate the contract, which was electronic and executed by Appellants only by electronically entering their names. (R. ___). Further, Appellants, who were all young college students in 2020, may have been on their way to gaining an education, but their education level and sophistication were much less than the drafters at Respondent. Appellants were in an unequal balance of negotiating power when compared with Respondent. At a minimum, there is a genuine issue of material fact as to whether the contracts at issue are adhesion contracts, but certainly the trial court was in error to find that the contracts were not contracts of adhesion and dismiss Appellants claims on this basis.

2. There is a genuine issue of material fact as to whether the Housing Contract allowed Respondent to lock the dorms, close the cafeterias <u>and</u> refuse to provide a full refund.

As with any written contract, the court looks to the terms executed by the parties to understand the duties and responsibilities agreed upon. The analysis of whether Respondent was entitled to conduct a campus-wide eviction and close meal services without providing a refund requires a close review of the Housing Contract. There is no dispute but that Respondent drafted the Housing Contract and in so doing included the following language (emphasis added):

> This application includes a **binding contractual agreement**…and **entitles you to an on-campus housing assignment**. (R. ___).
>
> **Residents receive a room and meal assignment**…**for the full academic year**. (R. ___).
>
> This contract becomes binding at the time of signature- the student shall pay the balance due as required by Charleston Southern University policies. **If the student attends class and fails to occupy the assigned room, the full cost of space and meal plan will nonetheless be due**. (R. ___).
>
> **By officially occupying a room**, the resident assumes full responsibility for the financial obligations of the agreement and specifically agrees to pay the housing fee in full as per the application and any associated fees, whether or not the resident actually utilizes the assigned space. (R. ___).
>
> All students residing in University Housing are **required to have a residential meal plan**. Required meal plans will not be cancelled or **refunded when a student is removed from campus housing for a violation of the Code of Student Conduct, Resident Life Guide and this Contract**. (R. ___).
>
> Applicable housing fees will be charged to residents **who check out of a room**

> **voluntarily** do not withdraw from [Respondent], and remain registered for at least one academic credit during a term within the agreement period. (R. ___).
>
> If a resident withdraws from the University and remains withdrawn for the full academic term, and checks out properly, the resident **will be charged housing fees based on the date of his or her occupancy**. If a resident withdraws during the fall term and re-enrolls and is registered for classes during the spring term, this agreement will remain in effect and the resident will be charged full housing fees as applicable. (R. ___).
>
> Additionally, [Respondent] **reserves the right to remove** resident students when a student's physical or emotional health…place unmanageable risks on the individual or [Respondent]. (R. ___).
>
> **[Respondent] reserves the right to make other rules and regulations** from time to time, as deemed necessary and proper for the safety…of residence halls, or for securing the comfort and welfare of all occupants, and to make sure rules and regulations [are] a part of this contract, with sufficient notice from [Respondent]. (R. ___).

Respondent argues the terms of the Housing Contract allow Respondent to refuse refunds if students involuntarily no longer occupy dorm, pointing to the "fails to occupy" language in ¶ 9(a). (R. ___). The exact phrase is "the student attends class and fails to occupy." (R. ___).

Respondent unilaterally closed its dorms and cafeterias on March 18 due to no action or inaction by Appellants. In fact, Respondent, nor the trial court, have described or explained how or why Appellants "failed to occupy" their rooms relying only on the fact that Appellants were no longer living in the residence halls after March 18, 2020. Appellants did not "fail to occupy" rather they were locked out. The trial court found that the Housing Contract places the risk of loss from any inability to occupy the room on the student, not Respondent. (R. ____). This outcome is illogical and excuses Respondent essentially from any performance.

The trial court's finding ignores the common meaning of the word "fail" which is defined as a verb in Mirriam Webster Dictionary as "to fall short, to become absent or inadequate, to be unsuccessful" or as a transitive verb as "to disappoint the expectations or trust of; to miss performing an expected service or function; to be deficient or to leave undone." Each of these definitions contemplate an action or inaction *on the part of the student.* There are no such actions or inactions on the part of the students in this scenario. The phrase "fails to occupy" cannot be read to mean Respondent is allowed to close the dorms, lock Appellants out and claim that Appellants absence is a failure to occupy whereby no refund is owed. This interpretation of the Housing Contract defies logic.

At the very least the term "fails to occupy" as it is used in the Housing Contract is ambiguous. Does the term "fails to occupy" mean only upon the action or responsibility of Appellants or does it mean Appellants failed because Respondent blocked Appellants from occupying through no fault of Appellants? While Appellants assert it means the former rather than the latter, the trial court and Respondent interpret it differently such that Respondent could block Appellants from occupying and thus creating the "fails to occupy" scenario. Of course, if "fails to occupy" is interpreted in the light most favorable to Appellants, summary judgment would not be proper.

A contract is ambiguous when it is capable of being understood in more ways than one. *Nicholson v. Nicholson*, 378 S.C. 523, 663 S.E. 2d 74, 79 (Ct.App. 2008) (*citing Davis v. Davis*, 372 S.C. 64, 641 S.E. 2d 446 (Ct. App. 2006)). "Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who is responsible for the verbiage." *Canal Ins. Co. v. Nat'l House Movers LLC*, 414 S.C. 255, 777 S.E.2d 418, 421 (Ct. App. 2015) (quoting *Ecclesiates Prod. Ministries v. Outparcel Assocs.*, LLC, 374 S.C. 483, 499 (Ct. App. 2007)). Applying this well accepted legal precedent, to the extent "fails to occupy" could possibly result from Respondent locking students out of the dorms, an ambiguity exists and that ambiguity is resolved in favor of Appellants.

The lower court's extensive briefing in its Order attempts to clarify an otherwise ambiguous contract. The trial court criticized Appellants for failing to identify language qualifying the phrase "fail to occupy" where students are unable to occupy their housing due to "a pandemic or hurricane," while simultaneously concluding Respondent had no contractual obligation to provide room and board during a public health emergency because no such language expressly appeared in the Housing Contract. **This very inconsistency demonstrates the ambiguity in the Housing Contract.** The lower court interpreted the Contract broadly enough to require students to continue paying for housing during a pandemic, while interpreting the same Contract narrowly enough to relieve Respondent of any obligation to provide housing during that same period. At minimum, these competing interpretations create a genuine issue of material fact regarding the parties' intent and the meaning of the Housing Contract, rendering summary judgment improper.

"Construction of an ambiguous contract is a question of fact to be decided by the trier of fact." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) "A contract is ambiguous when the terms of the contract are inconsistent on their face, **or are reasonably susceptible of more than one interpretation.**" *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 593, 492 S.E.2d 875, 879 (Ct.App. 1997) (citing 17A Am. Jur.2d Contracts § 338, at 345 (1991)) (emphasis). Further, such an ambiguity should be interpreted **in favor of the non-drafting party**. *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). The determination of the parties' intent is then a **question of fact** for the jury. *Id.* An interpretation which evolves the more reasonable and probable contract should be adopted, and a construction leading to an absurd result should be avoided. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975);

In *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009), this Court held that an ambiguity existed in a Settlement Agreement regarding the definition and scope of the phrase "landlord/tenant claims." A contract phrase may be susceptible to multiple interpretations, and if so, an ambiguity exists such that summary judgment is not appropriate but rather a jury should decide the meaning.

As established earlier, the Housing Contract is one of adhesion. The rule that an ambiguity should be construed against the drafter, in this case Respondent, applies with particular force in cases involving a contract of adhesion. *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 562 S.E. 2d 482, 484 (Ct. App. 2002) (*citing Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Calif. 1981)). If an ambiguity is found to exist in the Housing Contract, the determination of the parties' intent is a question of fact for the jury, and the case should proceed to trial. *E.g.*, *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009); *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 593, 492 S.E.2d 875, 879 (Ct.App. 1997).

Further, in interpreting the Housing Contract, the court should "construe the contract as a whole and read together the different provisions dealing with the same subject matter." *Buice v. WMA Securities, Inc.* 380 S.C. 149, 668 S.E.2d 430 (Ct.App. 2008) *citing Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.,* 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct.App.1993). The trial court's grant of summary judgment ignores the majority of the Housing Contract, which includes language agreeing to provide Appellants with housing accommodations and meal service "for the full academic year." Housing Contract p. 2 ¶ 2(b). The only provisions in the Housing Contract allowing Respondent to remove a student from housing without providing a refund are instances where the student has violated some policy such as a suspension or chosen to withdraw prior to the end of the academic year. Id. at 4, ¶ 11. The Housing Contract further states that "[a]pplicable housing fees will be charged to residents who check out of a room voluntarily do not withdraw from [Respondent], and remain registered for at least one academic credit during a term within the agreement period." (R. ___). As established earlier, Appellants did not check out voluntarily but rather were required to leave by decision of Respondent.

With regards to a meal plan, the only reference in the contract to the lack of a refund for a meal plan is where a student is removed from campus due to a violation of the Code of Student Conduct, Residence Life Guide, and this contract. (R. ____). Appellants were not removed from campus due to a violation, thus, by the plain wording of the Housing Contract, Appellants are owed a full refund, which Respondent admits Respondent has not provided.

Nothing in the Housing Contract clearly notified students that they would bear the financial risk of Respondent's own decision to deny access to campus housing. Taken logically, Respondent's position would mean that if one of its residence halls was condemned, Respondent could remove those students from housing but keep their housing payment, or refund only what it felt it could afford. This reasoning defies logic. Applying the rules of contract construction to the term "fails to occupy" in the light most favorable to Appellants requires reversal of the trial court' grant of summary judgment.

3. The trial court misconstrues Hendricks v. Clemson University to require Appellants to point to language that specifically requires Respondent to provide housing and meal service during a public health emergency.

The lower court erred in requiring Appellants to prove "an objective promise that Respondent would provide room and board even during a state and national . . . emergency" because a written contract existed. (R. ___). The lower court relied entirely on *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) to hold, "for Appellants to succeed on their claims for breach of contract, they must point to identifiable contractual promises that Respondent failed to honor." (R. __). However, the quote from *Hendricks* pertained a finding that the plaintiff had "fail[ed] to point to any written promise from Clemson to ensure his athletic eligibility and submits no real evidence to support his claim that such a promise was implied." This is not the case here. As demonstrated above, the Housing Contract, with a title that directly defines its purpose, specifically sets forth that by paying consideration, students are entitled to an assignment of a room and meal plan throughout the academic semester. (R. ___). Appellants have shown a specific promise to provide housing and a meal plan. Appellants only need point to a specific promise <u>when a written contract does not exist</u>, which they have done.

Appellants further established damages as to the Housing Contract because it is undisputed Respondent did not provide a full refund for room and board after students were denied access to campus housing. (R. ___). Based solely on the lower court's re-written contract terms, while Respondent <u>**is**</u> excused from providing room and board during a public health emergency, Appellants <u>**are not**</u> excused from paying for room and board during a public health emergency. The holding creates an illogical result that should be decided by a jury.

4. To interpret Respondent's reservation of rights in the Housing Contract to allow Respondent to lock the dorms, cease meal plans and refuse to refund students would be unconscionable in a contract of adhesion.

In § 15 of the Housing Contract, Respondent reserves rights specifically to remove individual students at times as well as establish rules and regulations necessary for the proper safety of residents halls and to secure the comfort and welfare of all occupants with sufficient notice from Respondent. (R. ___). However, these reservations of rights to preserve the health and safety of students occupying the dorms is not permission for Respondent to invoke a campus wide eviction, end meal services and refuse to provide full refunds to students. The Housing

Contract does not allow Respondent to conduct a campus wide eviction and cafeteria closure without providing students a refund for the amounts. To be clear, Appellants do not interpret § 15 as allowing Respondent to act in this manner without providing refunds, but if such an interpretation is accepted, then this portion of the Housing Contract is unconscionable.

Again, the Housing Contract is undoubtedly a contract of adhesion. A contract of adhesion is the beginning of the analysis such that contracts of adhesion are considered in a more skeptical fashion when determining whether the contract is unconscionable. *Id.* Respondent for the first time at the hearing cited to *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 to support its argument that the Housing Contract is not unconscionable. Respondent claims that certain terms in the Housing Contract allows Respondent to change the contract at any time, even so much as to bar students from their dorms, cease food services, and shutter the campus *without* providing a refund to Plaintiffs.

No person in their right mind would agree to pre-pay thousands of dollars in rent but allow the landlord to bar them from their home for multiple months with no refund. In *Damico v. Lennar Carolinas, LLC*, the Supreme Court of South Carolina reiterated the definition of unconscionability as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 617, 879 S.E.2d 748, 758 (2022) *citing Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 **S.C**. 399, 403, 472 S.E.2d 242, 245 (1996); 17A Am. Jur. 2d *Contracts* § 272 (2016); *see also id.* § 271 ("Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices ....").

Damico noted that an example of oppressive, one-sided nature of the parties' agreement included an “expressly negotiated and bargained for the waiver of the implied warranty of habitability for valuable consideration …in the amount of $0.” *Damico*, 437 S.C. at 617, 879 S.E.2d at 758 (2022). This is duly reiterated by the Court of Appeals of South Carolina in *Dawkins v. Eastwood Homes of Columbia, LLC*, and the Court of Appeals reads the *Damico* opinion to say that even “intelligence and success does not put them on an equal playing field with a large homebuilder....especially when presented with a 'take-it-or-leave-it' nonnegotiable, form contract” *See Dawkins v. Eastwood Homes of Columbia, LLC,* 2025 WL 1949798, at *8 (S.C. Ct. App. July 16, 2025), *cert. denied*. The *Dawkins* Court read *Damico* to clarify that the "sophistication of a residential homebuyer cannot compare to that of a large homebuilder in the context of a home purchase when involving a nonnegotiable form contract." *Id.*

This situation is not unlike the *Damico* case. To interpret the Housing Contract, as the Court interprets it, Respondent would be entitled to provide no refund even though Appellants were not provided with a habitable residence. While Appellants do not interpret the Housing Contract in this manner, if such an interpretation is accepted, it is unconscionable.

S.C. Statute § 36-2-302 allows a court to strike any portions of a contract that it finds to be unconscionable at the time it was made. If Respondent’s interpretation of the Housing Contract is to be accepted, the contracts are unconscionable and those unconscionable terms – namely that Respondent can revoke or revise the contracts at any time such that Appellants lose their residence as well as their food service and are not entitled to a refund -- must be stricken by the Court.

The lower court also faulted Appellants for failing to plead unconscionability. (R. ___). However, there is no such requirement. Respondent in its motion for summary judgment asserted certain interpretations of the Housing Contract that, if accepted, would be unconscionable. Appellants raised the issue of unconscionability in their opposition to summary judgment memorandum as well as at the hearing before the trial court.

C. Appellants were damaged due to Respondent's failure to provide refunds for the portion of the Spring 2020 Semester that Respondent did not provide housing or meal services.

Respondent admitted at the hearing and in its Memorandum in Support of its Motion for Summary Judgment that despite owing students millions of dollars as refunds pursuant to the Housing Contract, Respondent determined it would be better to let the students shoulder that expense and thus not provide full refunds. This admission establishes at a minimum a genuine issue of material fact as to whether Appellants suffered damages as a result of not receiving the full refunds owed to them.

Further Respondent admitted that there it only passed along savings from its stoppage of meal services rather than full refunds to Appellants (R. ___). Again, this admission at a minimum establishes a genuine issue of material fact as to whether Appellants suffered damages by not receiving refunds for the meal services they did not receive.

D. The Court erred in finding that the doctrine of educational malpractice barred Appellants' claims.

The lower court erroneously based its opinion on the holding of *Hendricks v. Clemson University* despite the facts at hand being readily distinguishable. In *Hendricks*, a college baseball player was academically ineligible to play baseball during his final season due to the faulty advice of his college advisor. 353 S.C. 449, 454, 578 S.E.2d 711, 713 (2003). The Supreme Court found the player's breach of contract claim could not proceed because it invited courts to engage in a type of subjective analysis that courts prohibiting educational malpractice claims in tort and contract have avoided. *Id.* at 459, 578 S.E.2d at 716. However, nothing in the case prohibited **objective claims**. *Id.* at 460, 578 S.E.2d at 716. Here, as discussed in more detail below, Appellants were students who were charged a premium to have an in-person, on campus experience when they could have paid less to take online classes. Objectively, Appellants are owed a refund. Unlike *Hendricks*, their claims are based on the objective increased charge for an on-campus experience—not the subjective quality of classes.

In analyzing the educational malpractice defense, the lower court did not address the holdings of *CenCor, Inc. v. Tolman*, 868 P.2d 396 (Colo. 1994) or *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992), which were both discussed in *Hendricks*. As the South Carolina Supreme Court distinguished, the objective contract claims in *CenCor* were allowed to go forward to the extent the claims referenced "**specific services for which the [plaintiffs] allegedly paid and which *CenCor* allegedly failed to provide**," including modern equipment and computer training for all students. *Hendricks*, 353 S.C. at 461, 578 S.E.2d at 716 (citing *CenCor*, 868 P.2d at 399) (emphasis added). Likewise, in *Ross*, "The court allowed the claim to proceed as a breach of contract action but made clear that the lower court would not reach the question of whether the university had provided deficient academic services" because it was subjective. *Id.* The *Hendricks* court made clear that claims capable of resolution through objective criteria are not barred.

This very point is strengthened by the Honorable Judge Newman's holding in *Bunch v. University of South Carolina*, where she found the students failed to suffer any damages that wouldn't invoke the educational malpractice doctrine because "[i]mportantly, USC charged the same amounts for tuition and fees for online instruction and face-to-face instruction." (R. ___). In that case, USC charged students the exact same amount for online and in-person classes, and thus there was no objective standard or damages for the court to consider. *Id.* at n.1. In addition, the USC students' sole argument was that in-person classes were better than online classes, creating a true educational question as to the quality of education. *Id.* (R. ___).

In contrast, Appellants were charged more for a Christian on-campus experience, including in-person classes, and they deserve a refund. That experience included a Christian environment, attending chapel, attending sporting events, Sweet 16 events, participating in sports intramurals, social clubs, and state-of the-art dormitories. (R. ___). Unlike USC, Respondent promised to provide Appellants with housing, food services, and access to an on-campus experience for Appellants paid a premium to receive. These are objective elements, which were not available to Appellants when the campus was closed. And there is a reliable means for calculating damages as demonstrated by Appellants' expert witness. (R. ____). This fact provides a reliable means for calculating damages certainly at the summary judgment phase, where the standard is whether a genuine issue of material fact exists. Additionally, like *CenCor* and *Ross*, the promises by Respondent were objective promises which could not be received when the campus was shuttered for 48% of the semester. (R. ___).

R-65, which is a part of the Contract between the students and Respondent, affirmatively states that face-to face courses in a non-accelerated format "…allows for the building of a greater community, the integration of faith, and the exploration of the goals and outcomes of a given course in the great tradition of academic inquiry." (R. ___). Further, multiple of Respondent's own employees and board members addressed the discrepancy in price between online only students and traditional full-time students as the on-campus experience that traditional full-time students were able to enjoy. Plaintiff Sydney Brown testified when asked why she decided to get involved in this lawsuit:

> A: I enrolled at Respondent for many reasons. A lot of – or some of the reasons that I chose Respondent were for the small class size, for the opportunity to work more closely with professors and not be in large lecture halls, for the opportunity to be enrolled – or to be involved in extracurricular opportunities, different clubs and organizations, to attend things on campus. I was interested in being in person and having community with others. If I had the interest of being online I would have gone somewhere closer to home in

state with cheaper tuition.

(R. ____).

Plaintiff Savannah McKenzie (referred to as Plaintiff Sands in the Court Order) testified that she believes Respondent:

> "provided improper refunds. We lost access to a lot of our amenities there that a lot of people chose to go to Respondent for, and that was the access was lost during Covid and we were not refunded properly according to the losses that we incurred. I just believe that it should be made right."

(R.___). McKenzie also testified that the in-person classes cost more and the online classes were more affordable but even with this knowledge a lot of students chose to pay the premium and attend on campus. (R.___).

Finally, Plaintiff Lysandra Serrano testified that she brought this lawsuit because she paid for services that were not received such as being able to stay on campus, the college experience of making friends on campus the non-virtual, traditional way. (R. ___). After being asked multiple times by opposing counsel if her education was harmed or lacking in quality, Serrano also testified that if her education was harmed or not by going online, she still, "missed out on the amenities and everything that goes with the reason why I went to Respondent." (R. ___). Finally, when asked if Serrano believed she had received a better quality of education in the Spring of 2020 would she still have sued, Serrano replied in the affirmative because she testified there would still be services that I did receive that were paid for. (R.___).

The trial court bases its decision on testimony by certain Appellants at time that they believed an online education is inferior to an in-person education. However, simply because Appellants believe that to be the case, does not change the fact that Respondent, as evidenced by its own board members and President's testimony charged more for an on-campus educational experience, which they failed to refund. This case is not about the quality of education Appellants received but rather what they were charged as full-time traditional students versus online only students.

The overarching issue for all the Appellants was the very objective issue that they paid a premium to be traditional full-time students with the ability to take in-person classes and importantly to enjoy the campus experience rather than attend online only classes. Taking the facts in the light most favorable to Appellants, they have provided evidence of breaches of objective promises by Respondent that are not barred by the educational malpractice doctrine.

The trial court found that to an even greater degree than classroom-related educational malpractice claims, claims for an inferior on-campus experience lack any meaningful standard of care or reliable means for calculating damages. However, in this case, the complete closure of the on-campus experience when the campus was barred is a meaningful standard. This case is not about just whether the experience could have been better. The entire campus, which Respondent repeatedly touts in its marketing material and website was shuttered for approximately one half of the semester. Again, at a minimum, there is a question of fact as to whether Appellants received what they bargained for – an online experience different than the online only students who were charged much less per hour.

E. The trial court erred in finding Appellants could not prove a claim for breach of the tuition contract when taking all of the facts and conclusions therefrom in the light most favorable to Appellants.

At the heart of this case involving the tuition charged by Respondent and paid by Appellants, is the question of what exactly Appellants paid for, which Appellants argue is clearly shown by the terms and documentation set forth in the documents provided to Appellants by Respondent. A contract is formed when one party gives the other sufficient consideration either to perform or refrain from performing a particular act. *Hendricks*, 353 S.C. at 459, 578 S.E.2d at 716; *citing Benya v. Gamble,* 282 S.C. 624, 321 S.E.2d 57 (Ct.App.1984). Offer and acceptance are essential to the formation of a contract. *Id.* (citing *Pierce v. Northwestern Mutual Life Ins. Co.,* 444 F.Supp. 1098 (D.S.C.1978)). If the evidence is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury. *Id. Benya,* 282 S.C. 624, 321 S.E.2d 57 (Ct.App.1984).

It is generally held that the basic legal relationship between students and a private university or college, such as Respondent, is contractual in nature and is made up of the catalogues, bulletins, circulars, and regulations of the institution made available to the student. *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992), a case cited by *Hendricks*, 353 S.C. at 460, 578 S.E.2d at 716 (2003). In Respondent's 30(b)(6) deposition, the deponent testified that the contract between Respondent and the student is made up of the student handbook, the Manual of Academic Policies & Procedures on the Registrar's website as well as the syllabus. (R. ___). There is significant documentation between Appellants and Respondent including the Application, the Statement of Financial Responsibility, the Student Handbook and the Manual of Academic Policies and Procedures, all of which form the contract(s) between Respondent and its students. When a student applies to Respondent, the application acknowledges that:

> All students enrolled at Respondent are responsible for abiding by the policies found in the Student Handbook. These policies promote a campus community and an environment conducive to being a successful student. (Ex. Y, Student Application Submission Defendant CSU -00308).

The Student Handbook for full-time traditional students describes the rules and guidelines for campus life. The Student Handbook for full-time traditional students specifically outlines Respondent's mission as "promoting academic excellence in a Christian environment." (R.___) In contrast, the Respondent Online/CAPS Student Handbook does not include this same mission statement. (R. __). Instead, the mission statement for Respondent Online is "to encourage, engage, and revitalize our students through learning, mentoring, and service to the community, our families and workplace." Id. In fact, the Respondent Online Student Handbook describes accessing and completing courses online with very little reference to the Respondent campus. (R. ___).

The following language was specifically included in Respondent's Manual of Academic Policies & Procedures: "[T]he academic leadership of [Respondent] believes and affirms that it is in the best interest of traditional students to take, when possible, traditional face-to-face courses in non-accelerated formats…[t]his allows for the building of greater community, the integration of faith, and a full exploration of the goals and outcomes of a given course in the great tradition of academic inquiry…..Although the university works to provide a full experience for online students…online programs are nevertheless different and thus the online student body had different demands." (R. ___). Respondent, by its own words, differentiates between the experiences paid for by full-time traditional students versus online only students.

1. The Tuition Contract is a contract of adhesion and should be considered with that in mind.

As discussed at length in the portion of this brief analyzing the Housing Contract, a contract of adhesion is a take-it or leave-it form contract with no ability for the entering party to negotiate. *Simpson*, 373 S.C. at 26-27, 644 S.E.2d at 669 (2007) *citing Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (2001). Appellants had no ability to negotiate the terms of the services and environment provided by Respondent. When a student enrolled at Respondent for the 2019-2020 academic year, the student accepted financial responsibility for paying tuition as set forth in an online document by clicking "yes" electronically. (R. ___). If they wanted to attend Respondent as a full-time traditional student, these were the terms of the contract as set forth in the documents described in the prior section. Thus, the following analysis of the Tuition Contract must be performed within the parameters of a contract of adhesion. Thus, any questions as to the meaning of language should be interpreted against the Respondent as the drafter and any ambiguities must be resolved in favor of the Appellants.

2. Respondent charges a premium for an on-campus experience for full-time traditional students.

The flat rate charged for 12 -18 hours for a full-time traditional student in 2020 was $13,000 as compared with the $490 per credit hour charged for an online only student in 2020. For 15 hours this totals roughly $7,350 for online only students. The difference in this charge reflects the premium that Respondent associates with full-time traditional students' ability to participate and be included in on-campus experience and college life. Further, there is significant testimony from board members as well as Respondent's president that the difference in this charge is for the on-campus experience. (R. ___). The Vice-President of Academic Affairs testified that tuition charged full-time traditional students is for the entire educational experience that comes with being on campus and being in class with the professor and other students. (R. ___). Board member Judith Kneece Hetz testified that Respondent markets its "community" and said that part of Respondent's appeal is its "Christian atmosphere." (R. ___). Had these full-time traditional students wanted an online-only experience, their tuition charge would have been less per credit hour. They paid for something different, and they did not receive it. Respondent even admits in responses to request to admit that it charges a higher tuition for full-time traditional students than it charges for online only students. (R. ___). The analysis should end here. Respondent charges a premium for the on-campus experience, which is necessarily a part of the Tuition Contract for Appellants.

Again, the Manual of Academic Policies & Procedures made it clear that there was a benefit to having access to the on-campus experience. (R. __). The following language was specifically included in Respondent's Manual of Academic Policies & Procedures: "[T]he academic leadership of [Respondent] believes and affirms that it is in the best interest of traditional students to take, when possible, traditional face-to-face courses in non-accelerated formats…[t]his allows for the building of greater community, the integration of faith, and a full exploration of the goals and outcomes of a given course in the great tradition of academic inquiry…..Although the university works to provide a full experience for online students…online programs are nevertheless different and thus the online student body had different demands." Respondent, by its own words, in a document that makes up the contract between Respondent and its students is differentiating between the experiences paid for by full-time traditional students versus online only students and acknowledging the advantages of full-time traditional students' on-campus experiences.

The premium charged for full-time traditional students was for the experience of an on-campus college as shown by the documents making up the contract between the Plaintiffs and Respondent supported and affirmed by the testimony of various Respondent administrators and board members. (R. ___). At a minimum, there exists an ambiguity as to whether Plaintiffs and the putative class were paying a premium for an on-campus experience.

When Respondent closed its campus in response to the Pandemic, Respondent stopped providing the on-campus experience it charged Appellants and the putative class a premium to enjoy.[10] Respondent breached its contract with Appellants and the putative class when Respondent failed to reimburse Appellants the pro rata share of the premium tuition paid to attend Respondent as full-time traditional students on campus. Appellants were also damaged when Respondent failed to reimburse Appellants the premium tuition for the portion of the semester when the campus was

[10] Again, Appellants do not fault Respondent for closing its campus on March 18, 2020 in response to the Covid Pandemic. However, as described in this brief, Appellants, who were all college students at the time, should receive a refund of the premium paid when Respondent could not uphold its agreement to provide an on-campus experience.

closed. Appellants suffered harm as a result.

Finally, Respondent argues that no implied contract exists between Appellants and Respondent that would require reimbursement for Respondent's failure to provide Appellants with access to the on-campus experience. As demonstrated above, there are multiple documents and testimony that support the finding of an express contract, but, at a minimum, there was an implied contract whereby Appellants and the putative class paid a premium for the right to participate in and enjoy the on-campus experience. Respondent claims that in order to state a claim for an implied contract in an education setting, "the student's complaint must be specific about the source of the implied contract, the exact promises the university made to the student and the promises the student made in return." Respondent cites the opinion in *Doe vs. Porter Gaud Sch*., 649 F.Supp. 3d 164, 176 (D.S.C. 2023). (R. __). However, contrary to the citation Respondent quotes in its brief, the *Porter Gaud* opinion specifically found that "**<u>other circuits that have considered implied-in-fact contracts for private schools and universities have found an implied-in-fact contract to exist in circumstances where a specific provision of that contract has been violated</u>**." *Porter Gaud Sch.*, 649 F.Supp. 3d at 175 citing *Shaffer v. George Washington Univ.*, 27 F.4th 754, 763 (D.C. Cir. 2022) (holding that the relationship between a university and its students is contractual in nature and therefore finding an implied-in-fact contract to provide in-person education); *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (finding an implied-in-fact relationship when university promised tutoring for an academically disadvantaged athlete it recruited for baseball when the university thereafter failed to provide tutoring).

Interestingly, the *Porter Gaud* opinion cites *Shaffer v. George Washington University*, 27 F.4th 754 (D.C. Cir. 2022) to support its finding that an implied-in-fact contract can exist between students and a university. In *George Washington*, the Court of Appeals for the District of Columbia denied the defendant university's motion to dismiss finding plaintiffs need only allege "sufficient factual matter, accepted as true to state a claim to relief that is plausible on its face." *Id.* at 764. In support of its opinion, the *George Washington* court noted that the universities' numerous references to the benefits of their on-campus instruction including phrases such as "the advantages of a traditional college setting." *Id.* at 764.

The *George Washington* court also noted a course of conduct supported the finding of a contract whereby the university agreed to provide an on-campus instruction, finding a "reasonable inference from Plaintiffs' factual allegations that [George Washington University] ha[d] a historic practice of providing on-campus instruction to students who pay the tuition associated with traditional on-campus-rather than online-education." *Id.* There exists a similar course of conduct between Respondent and Appellants. Respondent had a history of providing on-campus experiences to its students who paid the premium tuition associated with full-time traditional students. Further, Respondent testified that this history or course of conduct forms part of the contract between it and its students. (R. __).

In summary Appellants submit that the testimony from Respondent and its board members and officers, as well as Respondent's contracts with its students, in fact prove Appellants' case that there exists a contract whereby Plaintiffs paid a premium for an on-campus experience for which a refund is owed. At the very minimum, there is at least a question of fact as to whether a contract existed either express or implied between Respondent and Appellants whereby Appellants paid a premium for an on-campus experience.

While the court criticizes Appellants' ambiguity argument for attempting to insert meaning into the contract, this is exactly what the court does with its promises to provide certain things during a national emergency. If anything, the lower court's argument strengthens Appellants' argument that the contracts are, in fact, ambiguous.

At minimum, the provision is reasonably susceptible to more than one interpretation, rendering it ambiguous as a matter of law. Indeed, accepting Respondent's interpretation would impermissibly expand vague contractual language into a sweeping risk-shifting provision that the parties never expressly agreed to.

3. Appellants did not acquiesce or waive their right to receive a refund for the lack of an on-campus experience for half of the Spring 2020 Semester.

The trial court erroneously found that Appellants have "not shown a genuine issue of material fact as to their acquiescence to online instruction and closing the campus without refunding the tuition and fees they seek in this lawsuit." (R.___). The trial court points to the fact that Appellants continued in the transitional online courses for the second half of the Spring 2020 Semester rather than withdrawing. However, nowhere does the trial court mention and in fact there is no evidence that Appellants were offered a refund for all or any portion of their tuition or fees by accepting an invitation to withdraw. The trial court relies on Ex. 31 to Respondent's Memo in Opposition. However, a review of Exhibit 31 does not allow full-time traditional students to receive a refund if they are withdrawing past January 17, 2020 and then a reduced rate of only 25%. (R. ___). Further, Respondent admitted it has not provided any student with a refund for Spring 2020. (R. ___). The trial court's ruling on acquiescence portrays a mischaracterization of Appellants' claims. Appellants do not seek a total refund for their entire tuition. Rather, Appellants only seek a refund for the portion of their tuition that was attributable to the premium Appellants paid to participate as an on-campus student. If Appellants had withdrawn as the trial court suggests they should, there is no guarantee or even any suggestion they would be in any different position than they are now with regards to a refund.

A reasonable jury could conclude Appellants had not acquiesced or waived their right to a refund.

4. Any Reservation of Rights that Respondent argues allows Respondent to withhold the on-campus experience without a refund is unconscionable.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 24–25, 644 S.E.2d at 668; *see also Fanning v. Fritz's Pontiac–Cadillac–Buick, Inc.,* 322 S.C. 399, 472 S.E.2d 242 (1996) (same). In short, a challenged contractual provision in an adhesion contract is examined to determine whether it is unconscionable due to both (1) an absence of meaningful choice and (2) oppressive, one-sided terms. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Respondent argues and the trial court holds that Respondent reserved its right to amend its course offerings, policies, and procedures including the way it provided education to its students. (R. ___). The trial court cites to the provisions in the undergraduate catalogue, "[Respondent] reserve[s] the right to create, modify, or revoke University regulations and other information at any time without notification." (R. ___). To the extent this provision is read to allow Respondent to close its campus when charging Appellants a premium for an on-campus experience without providing a refund, it is an unconscionable provision in a contract of adhesion.[11] Further, considering this provision in the light most favorable to Appellants means it cannot be the basis

[11] As addressed previously, there is no requirement that Appellants plead unconscionability as an argument against Respondent's interpretation of the Tuition Contract. Appellants raised unconscionability in its memorandum in opposition to summary judgment and again at the summary judgment hearing before the trial court.

for a grant of summary judgment against Appellants.

F. The trial court erred in finding that Appellants could not prove damages as a result of any breach of the Tuition Contract.

In its Memorandum in Support of Summary Judgment, Respondent included calculations for Appellants' in-person tuition rate (in which the lower court fully relied) that were, at best, exemplify the questions of fact that remain in this case. Appellants submitted their own financial experts report setting forth the amounts Appellants are owed for a tuition refund. (R. ___). Appellant's expert calculated Appellants' tuition damages on the basis that Appellants paid more than they would have paid had they registered as online only students. *Id*. Respondent did not present a financial expert report.

Respondent alleges in support of its motion for summary judgment that Appellants have not suffered any financial damages as a result of the tuition they paid for Spring 2020. First, Respondent claims that online only students received no tuition assistance and thus Appellants as full time traditional students with access to tuition assistance actually paid less than online only students. The facts presented by Appellants raise a question of fact as to whether online only students receive tuition assistance, but additionally, there is a question as to whether any tuition assistance received by Appellants can be considered pursuant to the collateral source rule.

First, the discounts Respondent's counsel applies to the $13,000 fulltime, in-person tuition for Appellants would apply similarly to online-only students.[12] Appellants presented an exhibit printout from Respondent's website showing that online only students are entitled to discounts to

[12] Contrary to the affidavit of Mark Elmore provided by Respondent, Plaintiffs provided evidence that online only students received institutional discounts. Elmore did not limit his statement in his affidavit that online only students are not eligible to receive institutional aid from Charleston Southern to 2020. Exhibit 30 to Respondent's Motion in Support of Summary Judgment. In fact, the plain language of Mr. Elmore's affidavit does not address online only student discounts for 2020 at all. Thus, Mr. Elmore's affidavit does not support Respondent's claim that online only students paid the full charge of $490 per credit hour in Spring 2020. However, Plaintiffs submission undercuts Emore's affidavit and calls into question his testimony. At a minimum, the conflicting information raises a question of fact.

their tuition even from institutional funds. (R. ___). The website specifically references tuition discounts applied as well as employer discounts available to online only students and the fact that endowed scholarships are mostly for full-time traditional students, meaning necessarily they can be applied to online only students in some instances. *Id*. The lower court discounts this evidence claiming it is from the current website and not necessarily applicable to 2020. However, the affidavit of Mark Elmore provided by Respondent claims that online only students do not receive any tuition discounts without classifying that statement as being applicable to a certain date. Plaintiff's Ex. 1 from the hearing clearly disputes Mr. Elmore's affidavit and at a minimum creates a question of fact as to whether the $490 per credit hour charged to online only students in Spring 2020 was similarly discounted.

Despite Respondent alleging Appellants received additional funding from CARES Act refunds, which effectively reduce their in-person tuition, **the university conceded that CARES Act funding was NOT used solely for tuition**. Instead, it was only "used to assist with eligible expenses under Respondent students' cost of attendance, such as food, housing, course material, technology, healthcare, and child care." (R. __). A complete reduction to tuition in Respondent's calculations is unjustified. Further, the Student Printout submitted for Appellant Brown shows the CARES Act 'refund' **was charged and then removed**, reflecting a total balance of $0 instead of a credited refund:

Month/Year: 5/2020	Transaction Total:	-835.00		Month Ending Balance:		-835.00
Date	Description	Amount	Folio	Status	Receipt #	Receipt Code
6/8/2020	CARES Act Student Grant Sprg 20	-1,100.00		H		
6/12/2020	CARES Act Student Grant Refund Spg 20	1,100.00		H		
Month/Year: 6/2020	Transaction Total:	0.00		Month Ending Balance:		-835.00
Date	Description	Amount	Folio	Status	Receipt #	Receipt Code
7/31/2020	CARES Act Student Grant Refund Sprg 20	1,100.00		H		
7/31/2020	CARES Act Student Grant Sprg 20	-1,100.00		H		
Month/Year: 7/2020	Transaction Total:	0.00		Month Ending Balance:		-835.00

Secondly, Respondent's counsel's deduction of the Pell Grant is misleading, as all students, regardless of online or in-person status, can receive this federal grant as long as the necessary requirements are met. [13] Fulltime online students can also qualify for institutional scholarships. (R. __). Just like the in-person rate for each student would diminish with each scholarship or grant, so too would the online-only student rate. Respondent's inclusion of these scholarships is misleading. This is especially true given **Respondent has previously admitted its in-person credit rate was higher than its online-only credit rate.** (R. __).

Fourth, Respondent fails to discuss the course fees and room and board charged to each student in the Spring of 2020 based on the Student Printouts. While Respondent notes the technology course fee for online courses like Appellant Brown, both Respondent and the lower court **fail to account for the numerous fees charged for in-person classes as set forth in Burkett's report.**

Lastly, Respondent changed at least one calculation from its previously submitted Motion for Summary Judgment to its Proposed Order, which reflects an institutional work-study grant of $1,178 for Appellant Sands that was not included in Sands' Student Account Printout. Appellants are not sure where this number came from, how Respondent calculates work-study grants in its calculations to be applied to tuition rates, and if these discounts are applied, why they are not included in the Student Printouts:

From Respondent's Memorandum in support of its motion for summary judgment:

> - Sands' discounted tuition was $7,500, which accounts for the $5,500 CSU provided her in institutional aid. (**Exhibit 26**, Sands Student Account (CSU-01577–78.) She also received $1,178 for an institutional work-study grant, which she received although not being able to work after the pandemic. (*Id.*; **Exhibit 12**, Sands Dep. at 84:16-85:4). She took a courseload of 16 hours. Based on her out-of-pocket tuition and her courseload, her per-credit-hour rate was ***$395.13***.

[13] Federal Student Aid, *Student Eligibility for Pell Grants*, https://fsapartners.ed.gov/knowledge-center/fsa-handbook/2024-2025/vol7/ch1-student-eligibility-pell-grants (noting there is no limitation to qualifying for online only students).

From Respondent's Proposed Order:

- Sands' discounted tuition was $7,500, which accounts for the $5,500 CSU provided her in institutional aid. (Def.'s Exhibit 26, Sands Student Account.) She also received an institutional work-study grant, which she received although not being able to work after the pandemic. (Def.'s Exhibit 12, Sands Dep. at 84:16-85:4). She took a courseload of 16 hours. Based on her out-of-pocket tuition and her courseload, her per-credit-hour rate was ***$468.75***

Respondent's methodology in calculating the 'true' in-person tuition rate per student—which the lower court blindly accepts over and above Appellants' expert report without taking the above into account—demonstrates its cherry-picking efforts in calculating tuition. The Student Printouts do not reflect which courses were taken online versus in-person, nor do they reflect how many credit hours each Appellant was taking. Respondent presents these "calculations" without any actual support or affidavit but rather simply classifies these calculations as the actual tuition paid by Appellants. Given the conflicting and changing numbers Respondent has offered contesting Burkett's report, there is a genuine issue of material fact that should be determined by a jury.[14]

G. The Court erred in finding the contracts, as Respondent interprets them, are not unconscionable.

A Contract of adhesion is the beginning of the analysis such that contracts of adhesion are considered in a more skeptical fashion when determining whether the contract is unconscionable. *Id.* Respondent for the first time at the hearing cited to *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 to support its argument that the Housing Contract is not unconscionable. Respondent claims that certain terms in the Housing Contract allows Respondent to change the contract at any time, even so much as to bar students from their dorms, cease food services, and shutter the campus *without* providing a refund to Plaintiffs.

[14] Respondent also sold significant marketing and publicity to students touting its Christian campus, Christian fellowship and Christian experience as a part of the on-campus experience for which students paid a premium. (R. ___).

No person in their right mind would agree to pre-pay thousands of dollars in rent to live in a particular location but allow the landlord to bar them from their home for multiple months with no refund. In *Damico v. Lennar Carolinas, LLC*, the Supreme Court of South Carolina noted that an example of oppressive, one-sided nature of the parties' agreement included an "expressly negotiated and bargained for the waiver of the implied warranty of habitability for valuable consideration …in the amount of $0." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 617, 879 S.E.2d 748, 758 (2022). This is duly reiterated by the Court of Appeals of South Carolina in *Dawkins v. Eastwood Homes of Columbia, LLC*, and the Court of Appeals reads the *Damico* opinion to say that even "intelligence and success does not put them on an equal playing field with a large homebuilder....especially when presented with a 'take-it-or-leave-it' nonnegotiable, form contract" *See Dawkins v. Eastwood Homes of Columbia, LLC,* 2025 WL 1949798, at *8 (S.C. Ct. App. July 16, 2025), *cert. denied,* S.C. Sup. Ct. Order dated March 11, 2026 (Howard Adv. Sh. No. 14 at 6). The *Dawkins* Court read *Damico* to clarify that the "sophistication of a residential homebuyer cannot compare to that of a large homebuilder in the context of a home purchase when involving a nonnegotiable form contract." *Id.* This situation is not unlike the *Damico* case. To interpret the Contracts, especially the Housing Contract in the same way the Court interprets it, Respondent would be entitled to provide no refund even though Plaintiffs were not provided with a habitable residence. While Plaintiffs do not interpret the Housing Contract to allow barring Plaintiffs with no refund, if such a term exists, it is unconscionable.

S.C. Statute § 36-2-302 allows a court to strike any portions of a contract that it finds to be unconscionable at the time it was made. If Respondent's interpretation of the Housing Contract and the Tuition Contract are to be believed, the contracts are unconscionable and those unconscionable terms – namely that Respondent can revoke or revise the contracts at any time such that Plaintiffs are not entitled to a refund -- must be stricken by the Court.

H. The lower court erred in dismissing Appellants' claim for unjust enrichment to the extent it also finds that no contract existed.

The lower court repeatedly ruled that Appellants could point to no "identifiable contractual promises that Respondent failed to honor," and thus no contracts existed between the parties despite the existence of said contract not being in dispute. Assuming this Court accepts the lower court's interpretation—albeit Appellants' arguments to the contrary—then the lower court's dismissal of Appellants' unjust enrichment claim makes no sense. In the lower court's own words, "[u]njust enrichment is not an available remedy when a relationship is governed by contract." (R. ___) citing *Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 424-25, 559 S.E.2d 362, 364-65 (Ct. App. 2001) (affirming summary judgment on unjust enrichment claim because the parties' pleadings admitted the existence of a valid written contract covering the same subject matter). If there are truly no contractual promises and no contracts at issue, as the lower court has ruled, then a claim for unjust enrichment undoubtedly remains. Both cannot be true at once. Either a contract exists and Appellants cannot seek unjust enrichment, or the no contract exists and Appellants can seek unjust enrichment. Therefore, the lower court's reasoning inherently flawed and the grant of summary judgment should be overturned.

I. The lower court erred in finding that the collateral source rule does not apply to this matter.

The collateral source rule applies such that Respondent does not get the benefit of third-party source of payment for Appellants' housing and tuition. The idea behind the collateral source rule is that a wrongdoer should not receive a windfall simply because the injured party received the benefit of compensation from an independent source. *Gipson v. Coffey & McKenzie, P.A.*, 445 S.C. 395, 399, 914 S.E.2d 842, 844 (2025) citing *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 172, 604 S.E.2d 385, 393 (2004).

While the collateral source rule is commonly applied in tort claims, the language of the rule is not exclusive to tort claims. For example, in *Bardsley,* the case cited in the Order, the collateral source rule applies to a wrongdoer or a tortfeasor. Order at 3, FN 3; *see also Gregory*, 320 S.C. 90, 92 (1995); *Estate of Rattenni v. Grainger*, 298 S.C. 276 (1989); *New Found. Baptist Church v. Davis*, 257 S.C. 443 (1972). Under this phrasing, the rule is not limited to only tortfeasors and can apply more broadly to wrongdoers in other types of claims.

Respondent contemplated providing students with the requisite refunds and discussed the same in meeting minutes and other communications yet chose not to provide those refunds. In this case, Respondent is the wrongdoer for failing to provide the refund to which Plaintiffs are entitled.

CONCLUSION

In light of the above, the record before the trial court was replete with genuine issues of material fact that should be decided by a jury. Yet, the court repeatedly resolved disputed evidence and competing inferences in favor of Respondent, the moving party, rather than construing the evidence and all reasonable inferences in the light most favorable to Appellants, as required at the summary judgment stage. *E.g.*, *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

Additionally, Appellants established that Respondent's entry of default for a year and a half in this case should have been upheld because the certified remand order was in fact mailed to the clerk of Charleston County. Accordingly, Appellants respectfully requests that this Court reverse the order granting summary judgment as well as the order setting aside Respondent's entry of default and remand this matter for further proceedings.

Respectfully,

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