STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	CASE NO.: 2016-CP-21-1993
Crystal D. McLean,	)	
Plaintiff,	)	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO SCRCP RULE 12(B)(1) AND SCRCP RULE 12(B)(6)**
v.	)	
Francis Marion University,	)	
Defendant.	)	

This matter was before the Court pursuant to a Motion to Dismiss the Plaintiff's Complaint pursuant to SCRCP Rule 12(b)(1) and Rule 12 (b)(6) filed by the Defendant Francis Marion University (hereinafter "FMU").

BACKGROUND

The following facts are alleged in the Complaint and viewed in the light most favorable to the Plaintiff.

During the fall semester of 2015 (end of August 2015 through December 2015), the Plaintiff was enrolled in "Psychiatric Mental Health Nursing (Nurs 307) and set to graduate in December 2016. The Plaintiff's enrollment in the nursing program at FMU constituted an agreement between the Plaintiff and FMU, for her to pay a sum certain for educational services and for FMU in turn to provide the Plaintiff with instruction and education. (Pages 5-6 complaint).

The agreement between the parties was memorialized via numerous documents and materials. Specifically, students such as the Plaintiff were provided with "Clinical Evaluation Tools" and student handbooks which outlined the duties and responsibilities of both parties to this agreement. (Page 7 complaint).

The Nurs 307 course carries both a classroom and clinical component. Clinical rotations for the

first six (6) weeks began on September 9, 2015 and lasted through October 14,2015. Clinical rotations for the second six (6) weeks began on October 21, 2015 and lasted through November 18, 2015. (Pages 8-10 complaint)

On or about December 15, 2015, the Plaintiff was notified that she had failed the Nurs 307 course. Specifically, the Plaintiff was informed that she failed the clinical component of the course. Prior to being informed of her failure of the clinical component, the Plaintiff alleges FMU never informed the Plaintiff that her performance was unsatisfactory. (Pages 11-12 complaint)

The Plaintiff alleged that the failure to notice the Plaintiff that her performance was unsatisfactory violated FMU's own policies and procedures and breached the agreement between the parties. Specifically, but not limited to, the Plaintiff alleged FMU failed in the following:

> Performing a "mid-clinical evaluation", which according to the "Clinical Evaluation Tool" for NURS 307, FALL SEMESTER, 2015, was required and would have consisted of:
>
> 1. A written learning contract will be developed identifying the areas that need improvement and strategies to assist the student in meeting the clinical learning outcomes;
>
> 2. The learning contract must be signed by the student and faculty person (failure to sign will be a clinical failure); and
>
> 3. If the stipulations of the written action plan are not met by the date and time identified, then the student may receive a clinical failure.
>
> Providing clinical counseling or warnings pursuant to "Clinical Evaluation of Student Performance" in the FMU Nursing student handbook.
> (Page 12 and 12(a) — 12(b) and accompanying *Exhibits A & B* complaint)

The Plaintiff alleged that instead of providing the Plaintiff with the notice of unsatisfactory performance and counseling as required by the agreement between the parties and FMU's own policies and procedures, FMU instead provided the Plaintiff with a "Midterm Evaluation and Action Plan" after she was notified of her "failure." The Plaintiff claims that document fails to meet the

requirements as described above and also appears to have been generated *ex post facto* by EMU in an attempt to appear to have complied with their duties under the agreement between the parties and FMU's own policies and procedures. (Page 13 and *Exhibit* C complaint)

The Plaintiff went through the administrative appeals process of the university, but was unsuccessful. (Page14 complaint)

SCRCP RULE 12(B)(6) STANDARD

A party may move to dismiss a complaint against him under Rule 12(b)(6), SCRCP, based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence,* 368 S.C. 106, 116 (2006). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion,* 373, S.C. 390, 395 (2007). The question for the court is whether in the light most favorable to the Plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Sloan Const. Co., Inc. v.* Southco Grassing, Inc., 377 S.C. 108, 112-12 (2008) (citing *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E. 2d 188, 192 (2007).

DISCUSSION

I. PLAINTIFF'S CLAIM FAILS BECAUSE THEY ARE BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY

Article 10, Section 10 of the South Carolina Constitution, as well as Article 17, Section 2 provides "the General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." "Sovereign Immunity" is not immunity from liability but immunity from suit altogether. See, (*E.G. Federal Maritime Commission v. South Carolina State Ports Authority*), 533, U.S. 743, 766 (2002).

Prior to the decision of the South Carolina Supreme Court, *McCall v. Batson*, 285 S.C. 243, 329 S.E. 2d 741 (1985), governmental entities and their employees were protected by sovereign immunity. In *McCall*, the South Carolina Supreme Court abolished sovereign immunity. However, in the following year, the South Carolina General Assembly enacted the South Carolina Tort Claims Act "which reinstated sovereign immunity for the State and its political subdivisions with certain exceptions." *Jinks v. Richland County*, 339 S.C. 298, 563 S.E. 2d 104, 108 (2002), reversal of the grounds 538 U.S. 556 (2003). "The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue an action against the State and its political subdivisions." Id. The Tort Claims Act "removes the common law bar of sovereign immunity and circumstances, but only to the extent mandated by the Act." *Bayl v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E. 2d 736, 739 (Ct. App. 2001).

Thus, it is well settled that in reaction to *McCall*, the General Assembly reinstated sovereign immunity subject to the limited waiver specifically provided in the Act. As a result, the Act presently governing the tort claims against governmental immunities in South Carolina is an exclusive remedy for civil actions against governmental entities in South Carolina. *Washington v. Lexington County Jail*, 337 S.C. 400, 403, 523 S.E. 2d 204, 206(Ct. App. 1999).

The rules of statutory construction in this State further dictate that waivers of sovereign immunity are to be "strictly construed" by this Court in favor of the sovereign, *Wooten v. S.C. Dept. of Transp.*, 326 S.C. 516, 485 S.E. 2d 119 (Ct. App. 1997), *aff'd. Wooten v. S.C. Dept. of Transp.*, 333 S.C. 464, 511 S.E. 2d 355 (1999); see also *Escobar v. U.S. I.N.S.*, 935 F. 2d 650, 653 (4th Cir. 1991); *Fidelity Construc. Co. v. U.S.*, 700 F. 2d 1379, 1387 (Fed. Cir. 1983) ([B]road and general language which might be construed as consenting otherwise,

will not be so construed when [a] legislative body has elsewhere specified how and to what extent it consents to the specific liability to be enforced.")

Public post-secondary education institutions created and existing under State Law and their governing boards, cannot generally, in the absence of express statutory authority, be sued. 15 A Am. Jur. 2d Colleges and Universities §38. However, in *Kenzie Construction Company v. South Carolina Department of Mental Health,* 272 S.C. 168, 249 S.E. 2d 900 (1978) overruled on other grounds, *McCall v. Batson,* 285 S.C. 243, 329 S.E. 2d 741 (1985), the South Carolina Supreme Court held that whenever "the State of South Carolina pursuant to statutory authority enters into a valid contract, the State implicitly consents to be sued and waives its sovereign immunity to the extent of its contractual obligations." With this case being in mind, the Plaintiff cannot avoid the Doctrine of Sovereign Immunity by characterizing a claim involving a contract when its true nature is a claim that is in tort. *Rolandi v. City of Spartanburg,* 294 S.C. 161, 363 S.E. 2d 385 (1987).

While there is scant case law in South Carolina on the issue of sovereign immunity for higher education, case law exists in other jurisdictions.

In *Stern v. Board of Regents, University System of Maryland,* 380 Md. 691, 846 A. 2d 996, 187 Ed. Law Rep. 632 (2004), state university students brought an action against the University of Maryland Board of Regents. They alleged breach of contract as a result of the Board of Regents imposing a mid-year tuition increase. The Circuit Court dismissed the action. The students appealed. On its own initiative, the Court of Appeals granted writ of certiorari and held that the Board of Regents was protected by sovereign immunity. The tuition bills were not signed and written contracts by which the Board of Regents waived sovereign immunity.

The test that is employed is determining whether the doctrine of sovereign immunity applies in a particular case is as follows: (1) whether the entity asserting immunity qualifies for its protection; and, if so, (2) whether the legislature has waived immunity either directly or by necessary implication, in a manner that would render the defense of immunity unavailable. *Stern v. Board of Regents, University System of Maryland*, 380 Md. 691, 846 A. 2d 996, 187 Ed. Law Rep. 632 (2004). If a governmental agency or actor invokes the doctrine of sovereign immunity, there can be no contract or tort suit against it unless the legislature has specifically waived the doctrine. Sovereign immunity protected the Board of Regents from students' suit seeking a refund of the mid-year tuition increase because the legislature did not authorize and the Board of Regents did not institute , a mid-year tuition reimbursement policy. Therefore, the sovereign immunity of the state university was not waived.

Similarly, in *Davis v. Collin County Community College Dist.*, 2009 WL 3764135 (E.D. Tex 2009), a student was unable to bring a breach of contract claim against a public college because the college had not waived its governmental immunity. Thus, the fact that the college had not waived governmental or sovereign immunity was a defense to the student's action. In her complaint, the student did not assert that her claim involved, or was based upon, an agreement for providing goods or services to the college, which would have been the type of contract for which the government unit would have waived immunity. Rather, the student's breach of contract claim arose from her contention that the college had failed to provide her with an education. In another case brought under Texas law, governmental immunity precluded a graduate student's claim for breach of contract against a public university. The graduate student had not obtained legislative consent to sue the public

university, and the action was not commenced under a special statutory provision waiving the governmental immunity of the public university from such lawsuits. *University of Houston Main Campus v. Simons*, 2002 WL 31388906 (Tex. App. Houston 1st Dist. 2002).

While the General Assembly expressly provides that public post-secondary education institutions created and existing under the State Law cannot generally be sued, S.C. Code Ann. § 59-133-30 provides that Francis Marion "Board of Trustees" is a constituted as a body corporate and politic under the name of the Board of Trustees for Francis Marion University. The Corporation has the power to "(2) sue and be sued by the corporate name". This Court finds that this provides the Board of Trustees the ability to sue and be sued. It is not a blanket waiver of sovereign immunity for "FMU".

As discussed hereinafter, this Court finds that the substantial effect of the allegations of the Plaintiff is an educational malpractice action. Thus, the Plaintiff cannot avoid the Doctrine of Sovereign Immunity by characterizing her claim as one in contract when its true nature is one that is in tort. Therefore, this Court hereby finds that the Plaintiff's causes of action are barred by sovereign immunity as there has not been an express waiver by the General Assembly for these types of claims.

II. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT OR BREACH OF CONTRACT WITH FRAUDULENT INTENT

The Plaintiff alleges that FMU breached a contract with the Plaintiff.

To recover for a breach of contract, the plaintiff must prove: (1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 655 (Ct.App.2010) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89,124 S.E.2d 602, 610 (1962)).

To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: "(1) *a breach of contract;* (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres,* 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). "Fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." *Id.* at 466, 560 S.E.2d at 612. *Ro'fec Servs., Inc. v Encompass Servs., Inc.,* 359 S.C. 467, 470, 597 S.E.2d 881, 883 (Ct.App.2004) (emphasis added); *see McCullough v. The Am. Workmen,* 200 S.C. 84, 95, 20 S.E.2d 640, 644 (1942) (distinguishing between "a simple breach of contract" and "fraud in the breach of the contract")

Courts have declined to apply contract law rigidly in educational cases, when doing so would result in, overriding a purely academic determination. *Amaya,* 981 N.E.2d at 1240; *Kashmiri v. Regents of the University of California,* 156 Cal.App.4th 809, 825, 67 Cal.Rptr.3d 635, 646 (Cal.App. 1st Dist.2007). When courts are asked to review the substance of genuinely academic decisions, they should show great respect for the faculty's professional judgment and should not override that judgment unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. *Regents of the University* of *Michigan v. Ewing,* 474 U.S. 214, 225,106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985). Determinations concerning a **student's** qualifications rest in most cases upon the subjective professional judgment of trained educators, who are the best judges of their **student's** academic performance and his or her ability to master the required curriculum. *See Mittra V. University of Medicine and Dentistry of New Jersey,*

316 N.J.Super. 83, 91, 719 A.2d 693, 697 (App.Div.1998) (citing *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78, 85 n. 2,98 S.Ct. 948, 953, 55 L.Ed.2d 124 (1978)); see *also Amaya,* 981 N.E.2d at 1240. As such, school authorities have absolute discretion in determining whether a **student** has been delinquent in his studies. *Connelly v. University of Vermont and State Agricultural College,* 244 F.Supp. 156, 160. This is the case especially regarding degree requirements in the health care field, when the conferral of a degree places the school's imprimatur upon the **student** as qualified to pursue his chosen profession. *Doherty v. Southern College of Optometry,* 862 F.2d 570, 576 (6th Cir.1988), *cert. denied,* 493 U.S. 810, 110 S. Ct. 53, 107 L.Ed.2d 22(1989).

Courts both in South Carolina and across the nation have recognized this concern, and they routinely decide not to adjudicate academic questions. Courts, up to and including the United States Supreme Court, give great deference to school authorities. The United States Supreme Court has articulated the rationale for this deference in two key decisions. In *Epperson v. Arkansas,* 393 U.S. 97 (1968), the Court recognized that

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint... . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Id at 104. *Epperson* involved a teacher's challenge to her dismissal for violation of a state statute that forbade teaching the theory of evolution, but the Supreme Court reiterated the same principle of deference seven years later in *Gus v Lopez,* 419 U.S. 565, 578 (1975), which involved a student's challenge to a school's disciplinary decision.

Against this backdrop, the Supreme Court has declined numerous invitations to engage in judicial oversight of a school academic decision making. In *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78 (1978), for example, a student challenged her dismissal on academic grounds from a degree program of a public university. In rejecting that challenge and reversing a lower court decision, the Supreme Court relied on the high level of deference articulated in *Epperson* and *Guss.* Indeed, the Court questioned whether the judiciary could even review under an "arbitrary and capricious" standard, or whether academic decisions are entitled to even greater deference. *See Board of Curators,* 435 U.S. at 85, 91-92 (quoting from Epperson and *Goss* and noting that "[e]ven assuming that the courts can review under such a[n] [arbitrary and capricious] standard an academic decision of a public institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case"). "Courts are not *particularly "equipped"* the Supreme Court concluded, "to evaluate academic performance." *Id* at 91 (emphasis added). Similarly, in *Regents of the University of Michigan v. Ewing,* 474 U.S. 214 (1985), the Court turned back a student's challenge to his dismissal after he failed to pass a key examination. The Court reasoned that when judges are asked to review the substance of a genuinely academic decision,... they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial

departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Ewing, 474 U.S. at 225 (footnote omitted). At least one decision of the Fourth Circuit has recognized the same basic principle. *See Hardwick ex rd. Hardwick v. Heyivard*, 711 F.3d 426, 440 (4th Cir. 2013) ("Because school officials are far more intimately involved with running schools than federal courts are, '[i]t is axiomatic that federal courts should not lightly interfere with the day-to-day operation of schools." (citing *Augustus v. School Bd of Escambia Cnty., Fla"*, 507 F.2d 152, 155 (5th Cir.1975).

Indeed, South Carolina courts have set forth an extremely deferential standard, declining to review academic decisions in the absence of *"clear evidence of corruption, bad faith, or a clear abuse of power." Davis v. Greenwood County School District* 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005) (emphasis added) ("In general, courts will not disturb matters within the school board's discretion unless there is clear evidence of corruption, bad faith, or a clear abuse of power.")

This is an extraordinarily deferential standard, and our appellate courts have invoked this standard and deferred to the decisions of educators on several occasions. In *Laws v. Richland County School District No. I,* our Supreme Court rejected a teacher's challenge to a school district's decision not to renew his contract, holding that Consistency with relevant precedent requires that the scope of judicial review be a limited one. In view of the powers, functions, and discretion which must necessarily be vested in educational authorities if they are to execute the duties imposed upon them, this Court cannot substitute its judgment for that of these authorities.

Laws v. Richland Cnty. Sch. Dist. No. 1, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978).

This Court relied on the Laws decision in *Singleton v. Horry County School District*, 289 S.C. 223, 345 S.E.2d 751 (Ct. App. 1986), turning back a teacher's attempt to expunge a two-day suspension from his records and collect back pay for the suspension. This Court explained:

Courts will not interfere with the exercise of discretion by school boards in matters committed by law to their judgment unless there is clear evidence that the board has acted corruptly, in bad faith, or in clear abuse of its powers. An appellate court will not substitute its judgment for that of school board's in view of the powers, functions and discretion which must necessarily be vested in such boards if they are to execute the duties imposed upon them.

The Plaintiff points to Exhibit A of his Complaint to say that this creates a contract. A thorough reading of this "contract" reveals that is a clinical evaluation tool. The Plaintiff refers to this as a "contract" out of context. It states that there will be "a written learning contract will be developed identifying the areas that need improvement and strategies to assist a student in meeting the clinical learning outcomes". This is nothing but a form and/or syllabus that aides the student in the demands of the course.

While there are no cases on point in South Carolina, other states have held that a student cannot assert a breach of contract claim by treating a course syllabus as a contract.

As reported in *Gabriel v. Albany College of Pharmacy and Health*, in the United States District Court for Vermont, "The court finds no legal support for treating a course syllabus as a contract. The few courts that have considered the issue have concluded that a syllabus does not constitute a contract. *See, e.g., Yarcheski v. Univ. of Medicine and Dentistry of New Jersey*, 2008 WL 5133687, *4 (N.J.Super.Dec.9, 2008) (affirming lower court's ruling that course syllabus did not constitute legally enforceable contract); *Collins v. Grier*, 1983 WL

5148, at *2 (Ohio.App. July 27, 1983) ("there is no contract between a professor or instructor and a student created by the syllabus or university guidelines"). Indeed, a valid contract requires several elements, including mutual agreement and valuable consideration. *See, e.g., Manley Bros. v. Bush,* 169 A. 782, 783 (Vt.1934). A course syllabus which commonly outlines reading requirements, test dates and the like does not have any such attributes. Furthermore, there is a wealth of case law from around the nation that state failure to deliver on specific promises or representations contained in a college manual is not a contract between the student and educational institution.

A contractual relationship cannot be based on isolated provisions in a student's college manual. *Romeo v. Seton University,* 378 N.J. Super. 384, 875 A.2d 1043, 199 Ed. Law Rep. 329 (App. Div. 2005). In *Di Lelia v. University of Dist. of Columbia David A. Clarke School of Law,* 570 F. Supp. 2d 1, 237 Ed. Law Rep. 182 (D.D.C. 2008), the dean of the law school sent a letter to a student regarding the provision of accommodations for her disability. The provisions of the letter promised and obligated the law school to provide nothing more than the school was required to provide by law. Therefore, the law school's promises did not create the mutuality of obligation required to form an enforceable contract under the law of the District of Columbia.

An undergraduate catalogue of a university, which stated it was for information purposes and was not to be construed as a contract, did not form a binding, written contract between the board of regents and a suspended nursing student. Therefore, even if any conduct by the board of regents could have created a contract with the student, a breach of that contract was not enforceable against the board of regents. The board of regents had not waived its sovereign immunity regarding non-written agreements. *Carr v.*

Board of Regents of University System of Georgia, 249 Fed. Appx. 146, 228 Ed. Law Rep. 94 (11th Cir. 2007).

Moreover, general statements contained in a university's collected rules and regulations and faculty irresponsibility procedures did not constitute specific and discrete promises. Rather, they referred to a proper learning atmosphere and were aspirational in nature. The general statements did not support a breach of contract claim against the university. Also, a published class schedule was insufficient to qualify as a specific promise, and could not constitute the basis of a breach of contract cause of action. *Lucero v. Curators of University of Missouri*, 400 S.W.3d 1, 293 Ed. Law Rep. 1112 (Mo. Ct. App. W.D. 2013), reh'g and/or transfer denied, (Mar. 26, 2013).

A student handbook issued to a student at a private liberal arts college was not a binding contract between the student and the college. According to Alabama law, the handbook did not support the student's breach of contract claim. The student had been expelled from the university, and brought a breach of contract action against the school. The handbook lacked the aspects of offer, acceptance, and consideration. Additionally, the handbook contained an express clarification that it could be revised at the discretion of the university. The handbook further indicated that it was not to be construed as a contract between the university and the student. *Cook v. Talladega College*, 908 F. Supp. 2d 1214, 292 Ed. Law Rep. 901 (N.D. Ala. 2012).

Under Vermont law, not all terms in college's student handbook are enforceable contractual obligations, and courts will only enforce terms that are specific and concrete. *Knelman v. Middlebury College*, 898 F. Supp. 2d 697, 291 Ed. Law Rep. 161 (D. Vt. 2012). Furthermore, pursuant to the law of the District of Columbia, the rules and regulations in the

university's graduate school student handbook were not a binding contract between a graduate student and the university unless there was a showing that the university intended to be bound by such provisions. The relationship between a university and a student can be contractual, but a student claiming breach of contract is required to assert facts sufficient to establish the terms of the contract. The general principles of contract construction are applied to determine whether particular provisions of a student handbook become part of the contractual obligations between a student and the educational institution. *Mosby-Nickens v. Howard University*, 864 F. Supp. 2d 93, 285 Ed. Law Rep. 252 (D.D.C. 2012), appeal dismissed, 2012 WL 5896831 (D.C. Cir. 2012).

Lastly, the Courts require cases that have found that a contract exists, have to demonstrate that the decisions were arbitrary and capricious. The Plaintiff does not make any allegations in the complaint, are any arbitrariness, capriciousness or an abuse at power. These are necessary elements in a contract action for academic performance

III. THE PLAINTIFF'S BREACH OF CONTRACT AND BREACH OF CONRACT WITH FRAUDULENT INTENT CAUSES OF ACTION ARE NOTHING MORE THAN AN EDUCATIONAL MALPRACTICE CLAIM

As our Supreme Court has stated in *Hendricks v. Clemson University*, 353 S.C. 449, 570 S.E. 2d 711 (2003) "that recognizing a duty flowing from advisors to students is not required by any precedent and would be unwise, considering the great potential for embroiling schools in litigation that such recognition would create." The Court further stated that just as courts have prohibited recovery in torts for educational malpractice claims, courts have been equally reluctant to permit claims relating to academic qualifications of students or to the quality of education received when they are brought in contract. In barring contract actions for educational malpractice claims, courts have noted

that the policy concerns that preclude those claims and torts apply with equal force when claims are brought in contract. The Plaintiff seeks to create a new cause of action in tort for educational malpractice. Educational Malpractice refers to complaints against academic institutions alleging professional misconduct and analogous to medical and legal malpractice. *Kimberly A. Wilkins, Note, Educational Malpractice*; a cause of action in need of a call for action, 22 Val. U.L. Rev. 427 (1998). While often proposed as a remedy for those who think themselves wronged by educators, educational malpractice has been repeatedly rejected by American Courts." *Ross v. Creighton University*, 740 F. Supp. 1319 (N.D.III. 1990). Policy considerations preclude an actionable "duty of care" in persons and agencies who administer the academic phases of the public educational process. Extending tort liability to the educational sector "would put insufferable strains upon educators, forcing them to litigate every suit claiming negligence in a selection of curriculum, teaching methods, teachers, or extra-curricular activities. *Wi/s v. Continental Insurance Company,* 274 N.W.2d 679 (Wis. 1979).

This Court finds that the Plaintiff's cause of action cannot affect the sovereign immunity or the lack of recognition of an educational malpractice claim by characterizing her claim as one in contract when the true nature of this claim is in tort.

IV. THE PLAINTIFF'S ACTION FOR QUANTUM MERUIT IS INCONSISTENT WITH THE ALLEGATION OF THE EXISTENCE OF AN EXPRESS CONTRACT WITH FMU

Plaintiff's first cause of action is an effort to recover the judicially determined theory of quantum meruit. Occasionally, the term "quantum meruit" is used to describe the damages owed to a party when the contract to which it is a party does not provide a discernable measure. *See Brasivell v. Heart of Spartanburg Motel,* 251 S.C. 14, 159 5.E.2d

848 (1968). However, when used to describe a cause of action, it is used interchangeably with an action based on a contract implied in law. The two causes of action are the same. *See, e.g., Webb y. First Fed Says. & Loan Assin of Anderson,* 300 S.C. 507, 388 S.E.2d 823 (Ct. App. 1989); E. Allan Farnsworth, *Contracts* sec. 2.20, at 103 (2d ed, 1990).

However styled, Plaintiff is not entitled to a recovery because she simultaneously alleges that an express agreement exists between the parties which govern their relationship. There are three forms of contracts; express contracts, contracts implied in fact, and contracts implied in law. The first two are actual contracts. The first is one in which both parties flatly express orally or in writing the terms of their agreement and each agrees to so perform, a "contract implied in fact" arises when the assent of the parties is manifested only by conduct and not written or spoken words. *Stanley Smith & Sons v. Limestone College,* 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984). On the other hand, a "quasi contract" or a contract implied in law is no contract at all, but an obligation created by law in the absence of any agreement between the parties. *Id.* It is the well-established law of South Carolina for over one hundred years that there can be no implied contract if there is an express agreement between the parties. *Suber v. Pullin,1* S.C. 273 (S.C. 1870); *Stent v. Hunt,* 3 Hill 223 (S.C. 1837); *see also Gaines W. Harrison & Sons, Inc. v. J.I. Case Co.,* 180 F. Supp. 243 (D.S.C. 1960); *Limehouse v. Resolution Trust Cop.,* 862 F. Supp. 97 (D.S.C. 1994). Quantum meruit recovery is available for a quasi-contract only in situations in which there is an implied contract but no express contract. *Stanley Smith & Sons v. Limestone College,* 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984); *see also Strickland v. Coastal Design Assocs., Inc.,* 294 S.C. 421, 365 S.E.2d 226 (Ct. App. 1987). If there is an express contract, then the proper remedy is the contract price through an action for breach of contract, and a

quantum meruit recovery is not permitted. *Texcon, Inc. v. Anderson Aviation, Inc.*, 284 S.C. 307, 326 S.E.2d 168 (Ct. App. 1985). In *Limehouse v. Resolution Trust Corp.*, 862 F. Supp. 97 (D.S.C. 1994), a real estate broker sued the seller of a hotel for quantum meruit recovery. The plaintiff contended that he responded to a notice that any broker responsible for finding the buyer of an auctioned hotel would receive a 2% commission. After the auction, the seller refused to pay the commission. The court granted summary judgment against the plaintiff:

As a second cause of action, Plaintiff claims his brokerage services were rendered for the benefit of Defendant and that he is entitled to recover on the basis of *quantum meruit.* However, he also alleges in the Amended Complaint that he had a contract for the payment of the commission.... He is not entitled to recover under *quantum meruit* because a *quantum inertia* cause of action cannot be based on a contract.

Relief under a theory of *quantum meruit* is not available if a party bases its action on the existence of a contract. *Quantum meruit* is only available in circumstances where no contract exists, but the obligation to pay is implied by law. In Paragraph 19 of the Amended Complaint, Plaintiff alleges that at the time Plaintiff rendered his services for the Defendants, a contract existed between them for the payment of 2% of the sale price of the Inn." Thus, Plaintiffs *quantum meruit* cause of action fails as a matter of law. *Limehouse,* 862 F. Supp. at 103 (citations omitted).

In this case, Plaintiff has herself alleged that there is an express contract between Defendant and herself for the provision of educational services. That allegation is binding on Plaintiff. *See Postal v. Mann,* 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). Any allegations, statements, or admissions contained in a pleading are conclusive against the

pleader, and a party cannot subsequently take a contrary or inconsistent position. *Mellon Bank, N.A. v. Carroll,* 314 S.C. 468, 445 S.E.2d 466 (Ct. App. 1994).

That allegation, however, is fatal to the cause of action based on a quasi-contract. If the parties here were the subject of an express contract as alleged by the Plaintiff, a cause of action based on quasi-contract must fail as a matter of law. In *Charleston County School District v. Laidlaw,* 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001), the South Carolina Court of Appeals rejected the argument that a breach of contract action could be joined, in the alternative, with one for *quantum meruit* and affirmed the circuit court's dismissal of the equitable claim. For the same reasons, Plaintiffs first cause of action should be dismissed here. Thus, this Court finds that the Plaintiff's cause of action for Quantum Meruit fails as a matter of law.

V. THE COURT DISMISSES THE PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT SINCE THE PLAINTIFF HAS FAILED TO ALLEGE ANY FRAUDULENT ACT THAT IS SEPARATE FROM THE ALLEGED BREACH OF CONTRACT ITSELF.

Inherent in the concept of breach of contract accompanied by a fraudulent act is that there be some allegation of a fraudulent act. *McNair v. Rainsford,* 300 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). "In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Conner v. City of Forest Acres,* 348 S.C. 454, 465-66, 560 S.E. 2d 606, 612 (2002).

In this case, Plaintiff has not made any allegations of any independent fraudulent act relating to the supposed breach of contract. Instead, she has merely pled her basic contract action under a different heading. Her only allegation of any fraudulent act is FMU's conduct

in attempting to comply with their obligations after the fact by generating paperwork in an effort to make it appear that they have complied with their obligations under the agreement with the Plaintiff as well as their own policies and procedures. " (Complaint at para. 77) That however, is not a fraudulent act as required by the elements of the action. Furthermore, this alleged act occurred after the alleged non-compliance that the Plaintiff alleges created the breach of contract.

Breach of contract accompanied by a fraudulent act is not simply a combination of a claim for breach of contract and a claim for fraud. The action for breach of contract accompanied by a fraudulent act is not based on the same elements as an action for fraud (deceit). A claim of fraud goes to the making of the contract. It is based on the theory that the innocent party was induced to enter a contract he would not otherwise have made because he relied on a false representation by the fraudulent party. In other words, a claim for fraud relates to the making of the contract.

Breach of contract accompanied by a fraudulent act is different. It requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making. *Ball v. Canadian American Express Co.*, 314 S.C. 272, 276, 442 S.E.2d 620, 622-23 (Ct. App. 1994) (citations omitted).

The failure to complete the "learning contract" by the Professor is part of the very breach upon which Plaintiff's case is built. It is not an independent accompanying act, and there is certainly no allegation that the actual decision not to complete the "learning contract" was itself fraudulent at all. There is no allegation that, as a result of FMU's decision to memorialize a meeting with the Plaintiff was inducing any further action between the Plaintiff and FMU. Because Plaintiff has not pled any allegation supporting a

necessary element of breach of contract accompanied by a fraudulent act and the Court's finding that there is not a contract between the parties, the Court dismisses Plaintiff's fourth cause of action for failure to state a claim.

VI. THE PLAINTIFF CANNOT MAINTAIN A CAUSE OF ACTION AGAINST FMU FOR FRAUD SINCE THEY ARE IMMUNIZED FROM LIABILITY PURSUANT TO SC CODE ANN. '15-78-60 (17).

In South Carolina, the State and its subdivisions were immune from suit until the doctrine of sovereign immunity was abolished by the South Carolina Supreme Court in 1985. *See McCall v. Batson,* 285 S.C. 243, 329 S.E.2d 741 (1985). To replace that doctrine, the General Assembly adopted the South Carolina Tort Claims Act which retains *partial* sovereign immunity. S.C. Code Ann. § 15-78-10 *et seq.* (1976, as amended). Now, the State and its subdivisions are liable to the same extent that a private citizen would be, S.C. Code Ann. § 15-78-40, except where the tortious conduct is covered by one of thirty-seven exceptions, S.C. Code Ann. §15-78-60. Defendant cannot, as a matter of law, be held liable for the fraudulent conduct of its employee, the unnamed Professor. One of the exceptions to the Tort Claims Act provides that the government is not liable for a loss resulting from "employee conduct... which constitutes actual fraud." S.C. Code Ann. § 15-78-60(17). Plaintiff's fourth cause of action, however, states a claim for actual fraud against a subdivision of the State. Plaintiff claims that a state employee, the unnamed Professor, fraudulently told Plaintiff that she would be notified if she was performing unsatisfactory and counseled by way of her syllabus and/or class materials.

Furthermore, typically, a plaintiff may not recover for statements, even fraudulent statements, made concerning future events. In *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 440, 339 S.E.2d 142, 145 (Ct. App. 1985), for example, the plaintiff claimed that he had been told that repairs would be made to his boat and that he had endorsed an insurance check in reliance on those promises of future work. However, the repairs were never correctly made. In denying his right to recover for fraud, the court held that fraudulent statements must relate to existing conditions:

To establish actionable fraud, there first must be a false representation. The false representation, however, must be one of fact as distinguished from the mere expression of an opinion. As a general rule, fraud cannot be predicated on a statement that constitutes an expression of an intention. Further, an actionable representation cannot consist of a mere broken promise, even if a party acts in reliance on the promise. *Winburn.*, 287 S.C. at 440, 339 S.E.2d at 145 (citations omitted). The *Winburn* court did recognize an exception to the rule that fraud must relate to present conditions if promises are made and, at the time, there is no intention to perform. The court wrote, "An action in fraud, however, can be based on an unfulfilled promise to perform in the future made with a present undisclosed intention not to perform and for the purpose of inducing one to sign a paper or do some other act." *Id.* at 440, 339 S.E.2d at 145 (citing *Jones v. Cooper*, 234 S.C. 477, 109 S.E.2d 5 (1959)). However, the court wrote that "[The] truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date. Inferences of fact, like fullbacks on football teams, do not ordinarily run backward." *Winburn*, 287 S.C. at 440, 339 S.E.2d at 146 (citations omitted).

Here, Plaintiffs fraud claim is based on the promise that Professor would notify her if she was performing unsatisfactorily and to counsel the Plaintiff. Whether Plaintiffs allegations are true or not, she may not recover for fraud since the only representations concerned a promise to perform in the future. Moreover, there has been no allegation at all that the Professor did not initially fully expect to be able to provide the proper counseling. Indeed, Plaintiff herself specifically alleges that after she was notified of her failure, the Professor realized a problem and created a midterm evaluation and action plan (Complaint at para.13.)

As mentioned hereinabove, FMU cannot be held liable for fraudulent acts of its employees. Therefore, the Plaintiff has failed to state a cause of action to which relief can be granted in regard to her fraud claim.

VII. THE PLAINTIFF FAILS TO STATE A CLAIM UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT BECAUSE FRANCIS MARION UNIVERSITY IS NOT A "PERSON" AND ITS ACTIONS ARE NOT WITHIN "TRADE OR COMMERCE" FOR THE PURPOSES OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

The SCUTPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices *in the conduct of any trade or commerce* are hereby declared unlawful." S.C.Code Ann. § 39-5-20(a) (1985) (emphasis added). Although the SCUTPA provides for enforcement by the Attorney General, it also provides for an action by a private party "whoever suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by *another person* of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." *Id.* § 39-5-140(a) (emphasis added); F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 415-16 (4th ed.2011)

(discussing provisions of the SCUTPA and quoting section 39-5-140 of the South Carolina Code).

"To recover in an action under the SCUTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Wright v. Craft,* 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct.App.2006). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Gentry v. Yonce,* 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). "An act is 'deceptive' when it has a tendency to deceive." *Id.*

S.C. Code §39-5-10 (a) states "person" shall include natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." The definition does not include a governmental entity.

Even assuming arguendo that FMU constitutes a "person" susceptible to suit under the SCUPTA, the Plaintiff cannot satisfy the requirement that the alleged unfair act occurred "in the conduct of any trade or commerce."

It is well-established that "[t]he cardinal rule of **statutory** construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quotation omitted). Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.* It is only when applying the words literally leads to a result so patently

absurd that the General Assembly could not have intended it that we look beyond the statute's plain language. *Cabiness v. Town of James Island,* 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

Thus, this Court finds that a governmental entity is not defined as a "person" pursuant to the SCUTPA.

As defined by the SCUTPA, "trade or commerce" includes "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C.Code Ann. § 39-5-10(b) (1985). By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions.

Furthermore, by its very definition, "trade or commerce" involves "[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic." *Black's Law Dictionary* (9th ed.2009); *see Bretton v. State Lottery Comm'n,* 41 Mass.App.Ct. 736, 673 N.E.2d 76, 78-79 (1996) (recognizing that "the proscription in § 2 of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a business context" (citations omitted)).

In the instant case, FMU's sole action was the promulgation of a syllabus and student handbook. We find this act, which is alleged to have been unfair, does not fall within the definition of "trade or commerce" as it did not involve advertisement, sale, or distribution of services or property within a business context.

S.C. Code Ann. §39-5-40 (a) exempts from the South Carolina Unfair Trade Practices

Act "actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of the State or United States or actions or transactions permitted by any other South Carolina state law.

S.C. Code Ann. §59-133-30 creates a Board of Trustees constituted as a body corporate and politic under the name of Francis Marion University, including, but not limited to, the powers delegated to them by the aforementioned Statute. They have the power to adopt measures and make regulations as the Board considers necessary for the proper operation of the college. Therefore, any syllabus, handbook or policy and procedure are a delegated matter pursuant to South Carolina Law to the University. Therefore, the Plaintiff cannot maintain a cause of action under the South Carolina Unfair Trade Practices Act.

For the reasons stated above, the Plaintiff does not set forth facts that state a cause of action pursuant to the SCUTPA.

NOW, THEREFORE, based on the foregoing, it is hereby,

ORDERED, that the Defendant, FMU's Motion for Dismissal Pursuant to SCRCP Rule 12(b)(1) and Rule 12 (b)(6) is hereby granted and the Plaintiff's action is dismissed with prejudice for the reasons set forth more fully herein this Order.

AND IT IS SO ORDERED.

CERTIFIED A TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

FILED
2017 JAN 31 PM 2:53
DORIS POULOS O'HARA
C.C.P. & G.S.
FLORENCE COUNTY, SC

Michael G. Nettles
Presiding Judge of the Court of Common Pleas
Twelfth Judicial Circuit

At Chambers:
Florence, South Carolina.
1-31, 2017.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

FILED
2017 FEB -1 PM 12:19
DORIS FOULCS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2101993

RECEIVED
FEB 10 2017
SC Court of Appeals

Crystal D Mclean		Francis Marion University
PLAINTIFF(S)		DEFENDANT(S)
Submitted by:		For: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

CERTIFIED: A TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	2/1/2017 Date

For Clerk of Court Office Use Only

This judgment was entered on **January 31, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **February 1, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Patrick James McLaughlin PO Box 13057 Florence, SC 29504

G. Murrell Smith Jr. PO Box 580 Sumter, SC 29151-0580

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

NCE COUNTY CLERK OF COURT
IRBY STREET MSC-E
NCE, SOUTH CAROLINA 29501

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P.O. Box 13057
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