THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No. 2015-002090
Circuit Case No. 2012-CP-01-00158

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William Crenshaw, Appellant,

v.

Erskine College and David A. Norman, Respondents.

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# FINAL BRIEF OF RESPONDENTS

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## STATEMENT OF THE CASE

Crenshaw filed this action on June 6, 2012, as a result of his termination from employment with Erskine and the events leading up to the same. Crenshaw's Complaint alleges claims against Erskine and its former President David A. Norman for (1) wrongful discharge; (2) breach of contract; and (3) intentional infliction of emotional distress. (R. pp. 18-26.) Erskine filed its Answer to the Complaint on July 9, 2012, denying the claims. The parties engaged in extensive discovery in this matter, including multiple depositions and multiple sets of written discovery requests.

Erskine and Norman filed their Motion for Summary Judgment on all claims on March 28, 2014. The trial court held a hearing on Erskine and Norman's summary judgment motion at which both parties presented oral arguments in support of their respective positions. The trial court denied Erskine and Norman's Motion for Summary Judgment in its entirety. Prior to trial, Erskine and Norman filed a second motion for summary judgment only on Crenshaw's wrongful discharge cause of action under Supreme Court authority issued after ruling on its first motion for summary judgment. The trial court allowed arguments on the second summary judgment motion as part of pre-trial proceedings. During argument, Crenshaw conceded that his wrongful discharge claim was nothing more than an alternative statement of his breach of contract claim and merged the two claims.

The trial was held June 8, 2015 to June 11, 2015, at the Abbeville County Courthouse. At the close of Crenshaw's case, Erskine and Norman moved for directed verdict on all claims. (R. p. 338, lines 12-15.) The trial court granted the directed verdict motions on all claims as to Norman in his individual capacity, but denied the motions as

to Erskine. (R. p. 450, lines 3-16; R. p. 456, line 23; R. p. 457, line 15.) Crenshaw has not appealed the entry of judgment for Norman.

At the close of Erskine's case the court granted Erskine's directed verdict motion regarding the intentional infliction of emotional distress claim. (R. p. 751, line 15-p. 752, line 6.) Crenshaw has not appealed the entry of judgment for Erskine on this claim.

The breach of contract claim against Erskine was submitted to the jury. The jury returned a verdict in favor of Crenshaw in the amount of $600,000. (R. p. 793, line 20–p. 794, line 12.) Thereafter, on June 17, 2015, Erskine filed a JNOV motion or in the alternative for a new trial, and filed a supporting memorandum of law on July 10, 2015. (R. p. 85.) The court held a hearing on Erskine's JNOV motion on July 9, 2015. (R. p. 797.) Crenshaw filed a response to Erskine's JNOV motion. (R. p. 93.) In an Order dated July 22, 2015, the Court granted Erskine a new trial. (R. p. 5.) Erskine filed a Rule 59(e), SCRCP motion to alter or amend the judgment seeking clarification of whether the Court had denied the JNOV motion in order to properly preserve the issue for appeal. (R. p. 105.) Crenshaw also filed a Rule 59(e), SCRCP motion to alter or amend seeking to have the jury's verdict reinstated. (R. p. 102.) On August 24, 2015, the Judge issued an Order granting Erskine's JNOV motion and denying Crenshaw's Rule 59(e), SCRCP motion. (R. p. 6.) Crenshaw has appealed that Order.

## STATEMENT OF THE FACTS

### A. Context for Termination of Crenshaw's Employment

After a series of events that took place on September 24, 2010 involving a student in one of Crenshaw's classes having a head injury, three Erskine employees filed formal grievances against Crenshaw. (R. p. 1048.) The grievances were provided to Erskine's Grievance Committee for resolution, but the Grievance Committee was unsuccessful

resolving these issues. (R. pp. 1052-1055.) In an attempt to resolve the grievances, Norman appointed a special grievance committee to adjudicate the issues. (R. pp. 1052-1054.) The special grievance committee was unable to do so because of obstructionist actions and threats by Crenshaw. (R. pp. 1052-1054.) In the meantime, Crenshaw made blog posts which Norman determined reflected negatively on Erskine and its mission. (R. p. 1048, lines 8-9.) These three issues: (1) Crenshaw's conduct on September 24, 2010 and after, and the resulting grievances against him by three employees; (2) Crenshaw's treatment of the special grievance committee; and (3) Crenshaw's public postings on the internet, formed the basis of Norman's decision to begin the process for terminating a tenured faculty member. (R. pp. 1048-1056.)

**B. Procedures for Terminating a Tenured Faculty Member**

Erskine's Faculty Manual (the "Manual") sets forth detailed procedures for terminating the employment of a tenured faculty member. (R. p. 1152-1153.) The procedures are a multi-step process for the purpose of defending the rights of the tenured faculty member. (R. p. 619, lines 13-16.) The Manual first establishes specific grounds for dismissal including grounds constituting cause. (R. p. 1152.) The procedure for terminating a tenured faculty member's employment for cause begins with "Preliminary Proceedings." (R. p. 1152.) Preliminary Proceedings require the President to seek to resolve the matter with the faculty member in private and states that if the matter is not resolved "by mutual consent" then the President will formulate a statement describing the grounds for dismissal. (R. p. 1153.)

The second step in the procedure is titled "Formal Proceedings." (R. p. 1153.)

The Formal Proceedings step states:

> "The President will inform the tenured faculty member in writing of the dismissal and the grounds for it. The President will also advise the tenured faculty member of the right to a hearing before a faculty committee and will indicate the time and place of the hearing. In fixing the time and place of the hearing, the President will allow sufficient time for the tenured faculty member to prepare a defense. The President will inform the tenured faculty member of the procedural standards set forth here.
>
> The tenured faculty member will reply in writing to the President stating whether a hearing is desired, and the reply shall be not less than two weeks before the date set for the hearing."

(R. p. 1153.) The purpose of this hearing is to give the tenured faculty member an opportunity to defend against the grounds for dismissal. (R. p. 1153.)

The Manual's section titled "Hearing Committee" sets forth the procedures for the hearing on termination. (R. p. 1153.) The procedures include: (1) election of the Hearing Committee by the faculty consisting of seven members from the faculty, and the Hearing Committee's self-election of a chairperson; (2) the ability of the Hearing Committee to retain counsel at Erskine's expense to assist with its duties; (3) that the Hearing Committee will determine the order of witnesses and admissibility of evidence; (4) that the burden of proving the grounds for dismissal will be on the President and that the President may argue the case and present witnesses and may have the assistance of counsel; (5) that the tenured faculty member likewise may be assisted by counsel at the hearing and may offer and question witnesses; (6) that the Hearing Committee will use its influence to assist the parties in securing the presence of their witnesses; (7) that a verbatim record of the hearing will be kept; and (8) that the Hearing Committee will make a decision on each of the causes for dismissal presented to it and then

simultaneously notify the President and the tenured faculty member of the decision. (R. p. 1153.)

The Manual then provides that either the President or the tenured faculty member may appeal the Hearing Committee's decision directly to Erskine's Board of Trustees and may be represented by counsel in that appeal. (R. p. 1153.) The Board of Trustees' review will include oral and/or written argument by the President and tenured faculty member or by their counsel. (R. p. 1153.) Finally, the procedures for termination of a tenured faculty member include that the faculty member will be suspended from teaching during the termination procedures only if "immediate harm" to himself or others is threatened by his continuance. (R. p. 1153.) The provision regarding "immediate harm" does not require that the harm be physical harm. (R. p. 1153.) Crenshaw acknowledged that these procedures were part of the Manual which constitutes the contract at issue. (R. p. 388, lines 6-19; R. p. 403, line 11-p. 406, line 13.)

## C. Procedures of Erskine's Termination of Crenshaw's Employment

### 1. Preliminary Proceedings

By August 5, 2011, Norman had decided to initiate the for cause process in the Faculty Handbook. (R. p. 620, lines 9-19.) Norman wrote a letter to Crenshaw dated August 5, 2011 to introduce the Preliminary Proceedings. (R. p. 1192; R. p. 396, lines 6-25; R. p. 620, line 20-p. 621, line 1.) Norman then met with Crenshaw on Saturday, August 6, 2011, to begin the Preliminary Proceedings and to resolve the matter with the intent to keep Crenshaw employed without having to go into Formal Proceedings for termination of employment. (R. p. 986, line 24-p. 987, line 6; R. p. 621, lines 7-18; R. p. 630, lines 14-25.) Norman began the meeting by reading the letter dated August 5, 2011,

to Crenshaw, which stated Norman's hope that they could resolve the issues by mutual consent, but if they could not, then Norman would provide a statement describing the grounds for Crenshaw's dismissal. (R. p. 1192; R. p. 397, line 22-p. 398, line 20.) Norman had ideas of possible conditions that would in his mind resolve the matter with mutual consent but was open to other suggestions from Crenshaw. (R. p. 622, line 15-p. 623, line 7; R. p. 624, lines 5-7.) In the meeting on August 6, 2011, Norman offered Crenshaw conditions, consisting of three sets of apologies, which if met would allow him to remain employed. (R. p. 382, line 17-p. 384, line 3; R. p. 396, lines 6-25.) During the meeting Crenshaw called Norman names, threatened a lawsuit, and acted aggressively toward Norman. (R. p. 381, line 3-p. 382, line 14; R. p. 384, lines 14-19; R. p. 386, line 4-p. 387, line 2; R. p. 624, line 13-p. 625, line 7.) Despite Crenshaw's conduct, Norman maintained his composure and treated Crenshaw with dignity and respect. (R. p. 387, line 20-p. 388, line 1.)

At the end of the meeting Crenshaw proposed "Why don't you buy me off? I'm sure I could sell out. All you've got to do is offer me a decent price." (R. p. 1024, lines 14-21.) Crenshaw and Norman then seriously discussed a new option, severance pay in exchange for early retirement. (R. p. 1024, line 14-p. 1025, line 15; R. p. 626, lines 14-21.) Crenshaw and Norman agreed that Crenshaw would discuss the early retirement option including the amount of severance with his wife and make a decision about it by 5:00 PM on Monday, August 8, 2011. (R. p. 385, line 12-p. 386, line 3; R. p. 1027, lines 2-4; R. p. 1030, lines 8-12.) Despite insertion of the unexpected early retirement option into the discussion, Norman and Crenshaw were still in the Preliminary Proceedings stage at the end of their discussion on August 6, 2011, and the matter still could have

been resolved by other forms of mutual consent that would have allowed Crenshaw to remain employed. (R. p. 627, line 17-p. 628, line 3.) The meeting ended with Crenshaw outlining his three options: (1) to agree to the apologies requested by Norman for resolution by mutual consent; (2) to go to step two, *i.e.*, "Formal Proceedings" for termination where Norman would outline the grounds for termination; or (3) to accept the early retirement offer. (R. p. 1029, lines 12-22.) Crenshaw stated "I'm good with that. We'll do one of those three." (R. p. 1029, lines 12-22.)

Just before the agreed-upon deadline for Crenshaw to decide on the early retirement option he informed Norman that he and his attorney were willing to discuss the issue of his early retirement. (R. p. 1222; R. p. 629, line 8-p. 630, line 8.) Norman was unsure whether this response was a yes or no but treated it as acceptance of the offer. (R. p. 630, lines 1-8.) He responded that he would draft an agreement for the early retirement and a draft announcement for Crenshaw's approval to prompt a commitment from Crenshaw if he was in fact serious about retiring. (R. p. 1222; R. p. 630, line 14-p. 631, line 11; R. p. 632, lines 3-21.)

The next day Norman sent Crenshaw a draft agreement for an early retirement payment and a draft announcement of Crenshaw's retirement. (R. pp. 1222-1224.) Crenshaw responded that announcing his retirement was premature because he was still considering the severance agreement which provided up to 21 days to consider. (R. pp. 1222-1224.) The 21-day provision was required in order to obtain a valid release of a claim for age discrimination under the Age Discrimination in Employment Act of 1967. (R. p. 635, lines 10-16.) Norman responded that Crenshaw could indeed take the entire 21-day period to consider the early retirement agreement. (R. p. 636, lines 3-9.)

However, since Norman had already informed Crenshaw in the August 6 meeting that Crenshaw would not be teaching that semester, he provided Crenshaw with an alternative announcement to Erskine's faculty and staff that Crenshaw would not be teaching in the fall and that he and Norman were discussing his future with Erskine. (R. pp. 1224-1225; R. p. 1021, line 22-p. 1023, line 8.) Crenshaw responded that he disagreed with his removal from the classroom for the semester. (R. p. 1225.) Crenshaw's response also confirmed that he had not yet made a decision on the options he himself confirmed in the August 6, 2011 meeting. (R. pp. 1225-1226.)

**2. Formal Proceedings**

By the time of his e-mail to Dr. Norman on August 12, 2011, Crenshaw still had not selected any of the three options that he agreed to choose from by August 8, 2011. (R. pp. 1222-1226; R. p. 637, line 15-p. 638, line 10.) Norman, despite his efforts through communications with Crenshaw from August 8 to August 12, could not prompt Crenshaw to choose one of the three options: (1) resolve by mutual consent by making apologies; (2) move to formal proceedings by stating grounds for termination; or (3) accepting the early retirement option. (R. p. 1227; R. p. 637, line 15-p. 638, line 10.) Because of Crenshaw's failure to choose one of the agreed-upon options by the fourth day after the agreed-upon deadline, on August 12, 2011, Norman moved to formal proceedings and sent Crenshaw a thorough statement of the grounds for his dismissal. (R. p. 1227; R. pp. 1048-1056; R. p. 637, line 15–p. 638, line 10.)

Both Norman's cover e-mail to Crenshaw sending the grounds for dismissal, and the letter stating the grounds for dismissal, informed Crenshaw that he had to request a hearing in order to have the grounds for dismissal evaluated by his peers and gave him

the deadline by which he must request the hearing. (R. p. 1227; R. pp. 1048-1049; R. p. 400, line 17-p. 401, line 6.) The letter outlining the grounds for dismissal stated:

> "You have a right under College policy to a full hearing before a faculty committee. Unless you waive your right to a hearing, it shall be held on August 29th at 9 AM in the Chestnut Room. This schedule is subject to adjustment upon reasonable request. As also stated in the handbook, you will reply to this letter in writing stating, whether this hearing is desired. This reply shall not be less than two weeks before the date set for the hearing."

(R. p. 1049.) This language meets the Faculty Manual's requirements for formal proceedings, and in fact uses nearly identical language to the Faculty Manual regarding the requirement that a hearing will be scheduled, but that the employee must reply to the President in writing stating whether the hearing is desired and that the reply must be at least two weeks prior to the date set for hearing. (R. p. 1153.) Norman also informed Crenshaw that the hearing date could be adjusted upon Crenshaw's reasonable request. (R. p. 1049; R. p. 401, lines 1-10; R. p. 638, lines 11-23.) However, Crenshaw never requested the hearing to determine whether Norman's grounds for terminating his employment would pass muster. (R. p. 400, line 11-p. 403, line 1; R. p. 653, lines 8-12.) Crenshaw did not appear on the appointed date for the hearing. (R. p. 653, lines 15-24.) Norman did appear on the appointed date and waited for three hours in case Crenshaw arrived, which he never did. (R. p. 653, lines 15-24.)

While the Formal Proceedings were ongoing, the timeline for the offer of early retirement was also running. The original 21-day consideration period expired on August 30, 2011, without an acceptance or rejection of the offer by Crenshaw. (R. p. 1193; R. p. 653, line 25-p. 655, line 25.) Norman extended Crenshaw's time to respond to the early retirement offer by six days with a new deadline of September 5, 2011, and

communicated this to Crenshaw's attorney. (R. p. 653, line 25-p. 655, line 25; R. p. 407, lines 4-17.) However, Crenshaw did not respond to the early retirement offer by September 5, 2011. (R. p. 408, lines 3-6; R. p. 653, line 25-p. 655, line 25.) After the extended deadline to accept the early retirement offer expired a second time, and since Crenshaw had not made a timely demand for the hearing, Norman terminated Crenshaw's employment on September 7, 2011. (R. p. 857; R. p. 408, lines 7-12; R. p. 654, lines 2-25.) There is no dispute that Crenshaw has never requested a hearing up through today.

## ARGUMENTS

### STANDARD OF REVIEW

The standard of review is well established and widely cited. "When reviewing the circuit court's ruling on a directed verdict or JNOV motion, this court must apply the same standard as the circuit court "by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Jones v. Builders Inv. Group, LLC*, 415 S.C. 321, 328, 781 S.E.2d 737, 741 (Ct. App. 2015) (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004)). "The circuit court must deny a motion for . . . JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Id.* (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). However, the appellate court will only reverse the trial court when no evidence supports its ruling. *Wright v. Craft*, 372 S.C. 1, 32, 640 S.E.2d 486, 503 (Ct. App. 2006) (citing *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation,* 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); *Creech v. S.C. Wildlife & Marine Res. Dep't,* 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997)); *S.C. Prop. & Cas. Guar. Ass'n v. Yensen,* 345 S.C. 512, 521, 548 S.E.2d 880, 885 (Ct. App. 2001) (internal

quotations omitted). "In a law case, a jury's verdict may be reversed on appeal when the only reasonable inference to be drawn from the evidence is contrary to the factual findings implicit in the jury's verdict." *Watson v. Suggs*, 313 S.C. 291, 294, 437 S.E.2d 172, 173 (Ct. App. 1993) (internal citation omitted).

## I. CRENSHAW'S ARGUMENTS ON APPEAL WERE NOT PROPERLY PRESERVED FOR APPEAL AND SHOULD NOT BE ADDRESSED BY THE APPELLATE COURT.

As discerned by Erskine, Crenshaw presents two arguments on appeal, but argued neither of them in response to Erskine's JNOV motion. Therefore, neither argument was ruled upon by the trial court and cannot now be presented on appeal. *See Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court") (internal citations omitted).

Crenshaw states his first "Argument" on appeal to match his "Question Presented." (*See* Appellant's Final Br. p. 3, 18.) In both, he highlights the use of a special verdict form at trial to argue that the trial judge should not have granted JNOV after the jury's verdict using the special verdict form. *Id.* Crenshaw then cites the impropriety of submitting non-binding interrogatories to the jury in his "Standard of Review" and later argues that the jury's findings are binding on the trial court because of the use of the special verdict form. (*See* Appellant's Final Br. pp. 18-19, p. 20 n.1.)

Crenshaw's second argument, which is not stated in the "Argument" or "Question Presented" sections of his Initial Brief (*See* Appellant's Final Br. p. 3, 18), is that Erskine never intended to comply with its obligations under the Faculty Manual and thereby

breached the implied covenant of good faith and fair dealing that existed in the contract. (*See* Appellant's Final Br. pp. 19-24.)

Crenshaw did not make either of these arguments in opposition to Erskine's JNOV motion. He did not make them in: (1) Plaintiff's Response to Defendant Erskine College's Motion for JNOV and in the Alternative for a New Trial; (2) the hearing on Erskine's JNOV motion and in the alternative motion for new trial; or (3) Plaintiff's Motion to Alter or Amend the Order Granting Defendant Erskine College a New Trial. (R. pp. 93-98; R. pp. 797-804; R. pp. 102-104.) These briefings and events constitute all of Crenshaw's opportunities to argue the impact of the special verdict form and breach of the implied duty of good faith and fair dealing, but these arguments do not exist anywhere in the record. Moreover, the trial court's order granting Erskine JNOV also denies Crenshaw's motion to alter or amend the court's first order granting a new trial pursuant to Rule 59(e), SCRCP. (R. pp. 6-8.) In so doing, the trial court stated that "[b]y means of this order, the issues raised at trial and in each party's motion to alter or amend are comprehensively addressed." (R. p. 8.) Since Crenshaw did not raise issues regarding the special verdict form and breach of the implied duty of good faith and fair dealing, those issues were not considered or ruled upon by the trial court and cannot now be raised on appeal. *See Elam v. S.C. Dept. of Transp.*, 361 S.C. at 23; 602 S.E.2d at 779-780 (2004).

## II. THE TRIAL COURT PROPERLY GRANTED ERSKINE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON CRENSHAW'S BREACH OF CONTRACT CLAIM DUE TO CRENSHAW'S FAILURE TO FULFILL HIS SOLE OBLIGATION UNDER THE ALLEGED CONTRACT—TO REQUEST A HEARING IN WHICH HIS FACULTY PEERS COULD EVALUATE ERSKINE'S STATEMENT DESCRIBING THE GROUNDS FOR HIS DISMISSAL.

### A. Crenshaw cannot recover under the contract because of his own breach of the contract.

"It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time able, ready and willing so to perform it." *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951). Even "'[a]n infant who asserts contractual rights is bound by reciprocal obligations.'" *Id.* (citing 27 Am.Jur. 753). The trial court properly granted Erskine's JNOV motion because Crenshaw failed to perform his obligation under the Faculty Manual's procedure for terminating the employment of a tenured professor—the same procedure which Crenshaw claims Erskine violated and under which he claims entitlement to damages. (R. p. 388, lines 6-19.) As stated by the court, "As the undisputed evidence in this case is that Crenshaw failed to comply with the terms of the contract and request a hearing, he cannot recover on a breach of contract claim where he himself failed to fulfill the obligations of the contract and consequently breached the contract." (R. p. 7.)

The trial court granted Erskine's JNOV motion because there was no trial evidence that Crenshaw complied with his obligation under the alleged contract to request a hearing to review Erskine's grounds for terminating his employment. (R. pp. 6-8.) The trial court properly considered the issue because it was a matter of law for the

court to decide. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) ("An action for breach of contract is an action at law") (internal citation omitted). "Whether a contract is . . . . unenforceable is generally a question of law for the court." *Id.* (internal citation omitted). And, "all parties must be obligated under a contract in order for it to be enforceable." *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987) (internal citations omitted). Therefore, the ultimate question of whether the Contract was enforceable, was a question of law for the judge to decide.

Crenshaw appeals the trial court's order granting Erskine's JNOV motion. *See* Appellant's Final Brief p. 3. The evidence at trial, including Crenshaw's own testimony, supports the trial court's order granting JNOV, because it clearly establishes without the possibility of any inference otherwise that Crenshaw did not request a hearing to review the grounds for his termination. (R. p. 400, line 23-p. 401, line 3; R. p. 401, lines 11-12; R. p. 401, lines 14-22; R. p. 402, lines 15-16.) Since the appellate court will only reverse the trial court's ruling on a JNOV motion when there is no evidence to support it, and since there is ample evidence from Crenshaw himself that he did not request a hearing—he admitted to not requesting a hearing no less than three times at trial—then the JNOV must be affirmed. (R. p. 400, line 23-p. 401, line 3; R. p. 401, lines 11-12; R. p. 401, lines 14-22; R. p. 402, lines 15-16.)

In Appellant's Final Brief, Crenshaw argues that Erskine breached the Faculty Manual with regard to its duty to provide Crenshaw the hearing as part of his argument regarding breach of the implied duty of good faith and fair dealing. Because this argument is not properly before the Court (*see supra* Argument, Sec. I), and because the

implied covenant of good faith and fair dealing does not excuse Crenshaw's breach (*see infra* Argument, Sec. II.B.) it is unnecessary for Erskine to address its alleged breach based on the hearing. However, in order to correct the facts relied on by Crenshaw, Erskine will nonetheless do so briefly.

As the fifth example of alleged bad faith, Crenshaw argues that he should have been able to rely on the Faculty Manual's requirement that Norman fix the time and place of the hearing and that it would take place unless Crenshaw waived his right to it. (Appellant's Final Brief p. 23.) Norman did fix the time and place of the hearing for August 29 at 9 AM unless Crenshaw requested a reasonable adjustment to that date. (R. p. 1227; R. p. 1048.) But, Crenshaw did not request a reasonable adjustment or otherwise respond to the notice of the hearing. (R. p. 653, lines 8-12.) Norman appeared for the hearing and waited for Crenshaw for three hours, but Crenshaw never arrived. (R. p. 653, lines 15-24.) Furthermore, the Faculty Manual required Crenshaw to notify Norman in writing of his desire for a hearing. (R. p. 1153) ("The tenured faculty member will reply in writing to the President stating whether a hearing is desired, and the reply shall be not less than two weeks before the date set for the hearing"). Norman notified Crenshaw of this requirement in both the statement of grounds for dismissal and its cover e-mail. (R. p. 1227; R. p. 1048.) Crenshaw's argument that Norman did not so notify him is meritless.

### B. Crenshaw cannot avoid the dispositive effect of his own breach by arguing that Erskine breached the implied covenant of good faith and fair dealing.

If the Court deems Crenshaw's argument that Erskine breached the implied covenant of good faith and fair dealing to be properly before it then his argument that

such breach somehow precludes JNOV is of no merit. Crenshaw argues that Erskine breached the implied covenant of good faith and fair dealing in eight different ways. (Appellant's Final Br. pp. 21-24.) However, Crenshaw's argument fails because even if Erskine breached the duty of good faith and fair dealing (which it did not) that breach would not excuse Crenshaw from performing his obligation under the contract. *See Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (affirming the Court of Appeals's holding that one who has himself breached the contract cannot prevail on a claim for breach of the implied duty of good faith and fair dealing)[1]; *Williams v. Riedman*, 339 S.C. 251, 274, 529 S.E.2d 28, 40 (Ct. App. 2000) ("A breach of covenant of good faith and fair dealing cannot stand if the party seeking damages has not performed under the contract"). Furthermore, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract." *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). In other words, Crenshaw's failure to meet his contractual obligation to request a review hearing is dispositive of his breach of contract claim regardless of whether Erskine breached the implied covenant of good faith and fair dealing.

### C. The jury's verdict based on a special verdict form does not preclude the judge from properly granting a JNOV motion.

If the Court deems Crenshaw's argument that a jury verdict based on a special verdict form precludes a proper JNOV to be appropriately before it, then a jury verdict made using a special verdict form does not preclude JNOV. First, the rules and a

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[1] Erskine cited *Swinton Creek*'s holding that one who does not fulfill his own obligations under the contract cannot recover under the contract and its application of this holding to the implied covenant of good faith and fair dealing in its memorandum of law in support of its JNOV motion. (*See* R. p. 100.)

plethora of cases make clear that a jury verdict does not preclude a JNOV. *See* Rule 50(b), SCRCP ("Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict"); *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 305, 395 S.E.2d 742, 743-744 (Ct. App. 1990) ([A JNOV motion] "is available to one suffering an adverse ruling of the jury . . .").

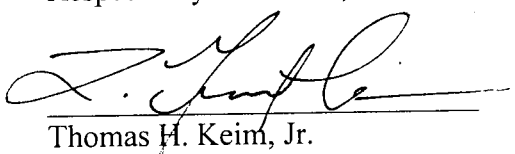
Crenshaw argues that *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653 (2006) supports his position that the court herein could not grant JNOV. Crenshaw's argument has no merit. In *Erickson*, at the close of plaintiff's case, the court and parties agreed to submit the issue of liability only to the jury without defendant presenting any evidence. *Id.* at 459-460, 661-662. The jury answered verdict interrogatories and found for the plaintiff. *Id.* at 461, 662. Then, the court denied defendant's directed verdict motion. *Id.* In the case before this Court, that never happened. Herein, the trial court granted Erskine's JNOV motion after the normal procedure of first denying Erskine's directed verdict motion and sending the case to the jury. (R. p. 751, line 22-p. 752, line 6; R. p. 4; R. p. 85.) Also in *Erickson*, the court reopened the liability phase of the case and allowed the defendant to present evidence on liability. *Id.* The court then directed the jury that its prior findings on liability using the verdict interrogatories were advisory and could be reconsidered. *Id.* On appeal, the Supreme Court ruled the liability verdict was supported by the record. *Id.* at 480, 672.

Herein, nothing of the sort occurred. The case ran a normal track, guided expertly by the trial judge, and based on undisputed testimony of Crenshaw himself, a JNOV was correctly entered.

## CONCLUSION

Based on the foregoing arguments and authorities the trial court properly granted Erskine JNOV because the undisputed evidence in the record confirms that Crenshaw breached the contract by not requesting a hearing. "It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part. . . ." *Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951).* This basic tenant of contract law dictates that the trial court's Order granting JNOV must be affirmed.

Respectfully submitted,



September 28, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge



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Appellate Case No. 2015-002090

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William Crenshaw, Appellant,

v.

Erskine College and David A. Norman, Respondents.

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Rule 211, SCACR Certification

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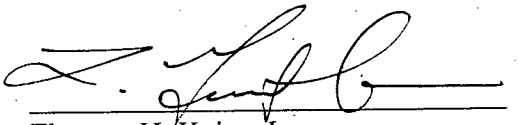
I hereby certify that this Final Brief of Respondents complies with Rule 211(b), SCACR.



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