THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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S.C. SUPREME COURT

Circuit Court Case No. 2012-CP-01-00158

Opinion No. 5571 (S.C. Ct. App. Filed June 27, 2018)
Appellate Case No. 2015-002090

William Crenshaw, Respondent,

v.

Erskine College and David Norman, Petitioners.

PETITION FOR A WRIT OF CERTIORARI

BY ERSKINE COLLEGE AND DAVID NORMAN

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CERTIFICATION OF COUNSEL

By and through its undersigned counsel, pursuant to Rule 2422(d)(1) SCACR, Petitioner Erskine College ("Erskine"), certifies that the Court of Appeals filed its opinion in this case (the "Subject Decision") in favor of William Crenshaw ("Crenshaw") on June 27, 2018 (A.[1] at 1546), that it timely petitioned for rehearing, and that its petition has been finally ruled on, the Court of Appeals denying it by order filed September 20, 2018. (A. at 1585.)

[1] Citations to the Appendix will be made as "A. at."

QUESTIONS PRESENTED

I. **Did the Court of Appeals err in finding Crenshaw's appellate argument that Erskine breached the implied covenant of good faith and fair dealing was preserved?**

   A. **Did the Court of Appeals err in finding that Crenshaw's implied covenant of good faith and fair dealing argument, made in opposition to Erskine's directed verdict motion at the close of trial—which Crenshaw won—i.e. before Crenshaw was the losing party or aggrieved party, was sufficient to preserve that argument?**

   B. **Did the Court of Appeals fail to apply established preservation rules because Crenshaw's implied covenant of good faith and fair dealing argument did not meet the required specificity for the trial court to have considered it, or because the trial court did not rule upon that issue?**

   C. **Did the Court of Appeals fail to apply established preservation rules because Crenshaw's breach of the implied covenant of good faith and fair dealing argument was not part of Crenshaw's, and was made for the first time on appeal?**

II. **Did the Court of Appeals fail to apply established preservation rules by holding that the legal issue of breach of contract was transformed to a question of fact by use of a special verdict form when Crenshaw did not present this issue on appeal?**

III. **Does the Court of Appeals's reversal of JNOV based on its holding that Erskine breached the implied covenant of good faith and fair dealing, assuming *arguendo* that Erskine so breached, irreconcilably contradict this Court's holding in *Swinton Creek Nursery v. Edisto Farm Credit, ACA*?**

IV. **Did the Court of Appeals err in holding that Erskine breached the implied duty of good faith and fair dealing?**

V. **Did the Court of Appeals err by contradicting its own holding in the Subject Decision, and misapplying the law, when it found that use of a special verdict form transformed the legal issue of breach of contract into a question of fact for the jury?**

VI. **Did the Court of Appeals err in speculating about questions of fact the jury may have considered, or in applying these questions of fact to the JNOV standard?**

STATEMENT OF THE CASE AND MATERIAL FACTS

I. Procedural History

Crenshaw filed this action on June 6, 2012, challenging his termination from employment with Erskine. 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. (A. at 17-34.) The crux of Crenshaw's case was that Erskine breached its procedures for terminating a tenured faculty member for cause contained in its Faculty Manual ("Manual"), which Crenshaw alleged formed a contract of employment.

Pre-trial, 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 into a claim for breach of contract. (A. at 85-92, 134-135.)

The trial was held from June 8, 2015 to June 11, 2015 at the Abbeville County Courthouse. At the close of Crenshaw's case, Erskine moved for directed verdict on all claims. (A. at 453.) 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. (A. 456-457.) Crenshaw has not appealed the entry of judgment for Norman. At the close of Erskine's case the trial court granted Erskine's directed verdict motion regarding the intentional infliction of emotional distress claim as to Erskine, and after extensive arguments on the breach of contract claim the trial court denied the motion as to that claim. (A. at 751-752.) Crenshaw has not appealed the entry of judgment for Erskine on intentional infliction of emotional distress.

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 finding that Crenshaw had not breached the alleged contract and that Erskine had breached. (A. at 12, 793-94.) 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. (A. at 93, 107.) Crenshaw filed a response to Erskine's JNOV motion. (A. at 101.) The court held a hearing on Erskine's JNOV motion on July 9, 2015. (A. at 813.) In an Order dated July 22, 2015, the Court granted Erskine a new trial. (A. at 13.) 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. (A. at 113.) Crenshaw also filed a Rule 59(e), SCRCP motion to alter or amend seeking to have the jury's verdict reinstated. (A. at 110.) On August 24, 2015, the Judge issued an Order granting Erskine's JNOV motion and denying Crenshaw's Rule 59(e), SCRCP motion. (A. at 14.) Crenshaw appealed that Order.

In its directed verdict motion and motion for JNOV, Erskine argued that even if the Manual was a contract, Erskine followed the Manual's procedures for terminating Crenshaw's employment. Erskine further argued that even if it did not meet its obligations under the alleged contract by not following the termination procedures, Erskine should still prevail on the breach of contract claim because Crenshaw also did not meet his obligations under the alleged contract, which would preclude him from enforcing the alleged contract. (A. at 93, 107, 748-768.) The trial judge granted Erskine's JNOV motion because Crenshaw failed to meet his obligation under the alleged contract. (A. at 14-16.)

The Court of Appeals filed the Subject Decision on June 27, 2018, reversing the circuit court and holding that: (1) Crenshaw's attorney's statement made in argument on Erskine's directed verdict motion regarding breach of contract at the close of Erskine's case that, "it shows a lack of good faith" was enough to preserve the issue of the implied covenant of good faith and fair dealing for appeal; (2) Erskine breached the implied covenant of good faith and fair dealing in

the alleged contract; (3) "[b]y submitting the special verdict form to the jury, without objection, the parties agreed it was a question of fact as to whether the contract was breached; (4) the jury could have found questions of fact as to whether the contract was breached and those questions precluded Erskine from meeting the JNOV standard; and (5) Crenshaw's argument that the use of the special verdict form precluded JNOV was not preserved for appeal and in any event was wrong. (A. at 1546-54.) Erskine timely petitioned for rehearing. (A. at 1555.) The instant petition is timely filed following the Court of Appeals's order denying rehearing filed September 20, 2018. (A. at 1585.)

II. 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. (A. at 1375-77, 1383-84.) The grievances were provided to Erskine's Grievance Committee for resolution, but the Grievance Committee was unsuccessful resolving these issues. (A. at 1369-71, 1396.) In an attempt to resolve the grievances, Norman then appointed a special grievance committee to adjudicate the issues. (A. at 1370.) The special grievance committee was unable to do so because of obstructionist actions and threats by Crenshaw. (A. at 1370-71, 1408, 1410-24, 1426-27.) In the meantime, Crenshaw made blog posts which Norman determined reflected negatively on Erskine and its mission. (A. at 1372-73, 1429-31.) 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. (A. at 1365-73.)

III. Procedures for Terminating a Tenured Faculty Member

Erskine's Faculty Manual (the "Manual")—the only document Crenshaw alleges creates a contract for his employment—sets forth detailed procedures for terminating the employment of a tenured faculty member. (A. 1469-70.) The procedures are a multi-step process for the purpose of defending the rights of the tenured faculty member. (A. at 635.) The Manual establishes specific grounds for dismissal including grounds constituting cause. (A. at 1469.) The procedure for terminating a tenured faculty member's employment for cause begins with "Preliminary Proceedings," which require the President to seek to resolve the matter with the faculty member in private. (A. at 1469-70.) If the matter is not resolved "by mutual consent" in Preliminary Proceedings then the President will formulate a statement describing the grounds for dismissal, which moves the termination into the second step titled "Formal Proceedings." (*Id.*) 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."

(*Id.*) The purpose of this hearing is to give the tenured faculty member an opportunity to defend against the grounds for dismissal. (*Id.*) The Manual's section titled "Hearing Committee" sets forth detailed procedures for the hearing on termination including that the hearing committee is made up of only faculty peers and that the burden of proving the grounds for dismissal will be on

the President. (*Id.*) 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. (A. at 1470.)

IV. Procedures of Erskine's Termination of Crenshaw's Employment

1. Preliminary Proceedings

Norman wrote a letter to Crenshaw dated August 5, 2011 to introduce the Preliminary Proceedings. (A. at 636, 1509.) 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. (A. at 405-406, 637, 646, 1303-04, 1509.) 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. (A at 390-92, 404.) During the meeting Crenshaw called Norman names, threatened a lawsuit, and acted aggressively toward Norman. (A. at 389-90, 392, 394-95, 640-41.) Despite Crenshaw's conduct in the meeting, Crenshaw admitted that Norman maintained his composure and treated Crenshaw with dignity and respect. (A. at 395-396.)

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." (A. at 1341.) Crenshaw and Norman then discussed a new option, severance pay in exchange for early retirement. (A. at 642, 1341-42.) 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. (A. at 393-94, 1344, 1347.) Norman and Crenshaw were still in the Preliminary Proceedings stage at the end of their discussion on August 6, 2011. (A. at 643-44.) 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. (A. at 1346.) Crenshaw stated "I'm good with that. We'll do one of those three." (*Id.*)

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. (A. at 645-46, 1539.) Norman was unsure whether this response was a yes or no but treated it as acceptance of the offer. (A. at 646.) 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. (A. at 646-48, 1539.)

The next day Norman sent Crenshaw a draft agreement for an early retirement payment and a draft announcement of Crenshaw's retirement. (A. at 1539-41.) Crenshaw responded that announcing his retirement was premature because he was still considering the severance agreement which provided up to 21 days to consider. (*Id.*) 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. (A. at 651.) Norman responded that Crenshaw could indeed take the entire 21 day period to consider the early retirement agreement. (A. at 652.) 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 that Crenshaw would not be teaching in the fall and that he and Norman were discussing his future with Erskine. (A. at 1338-40, 1541-42.) Crenshaw responded that he disagreed with his removal from the classroom for the semester. (A. at 1542.) Crenshaw's response also confirmed that he had not yet made a decision on the options he himself confirmed in the meeting on August 6, 2011. (A. at 1542-43.)

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. (A. at 653-54, 1539-43.) 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. (A. at 653-54, 1544.) Because of Crenshaw's failure to choose one of the agreed-upon options by the fourth day after the agreed-upon deadline, August 12, Norman moved to formal proceedings and sent Crenshaw a thorough statement of the grounds for his dismissal. (A. at 653-54, 1365-73, 1544.)

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. (A. at 408-09, 1365-66, 1544.) Norman's 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."

(A. at 1366.) This language 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. (A. at 1470.) Norman also informed Crenshaw that the hearing date could be adjusted upon Crenshaw's reasonable request. (A. at 409, 654, 1366.) However, Crenshaw never requested the hearing where his peers could determine whether Norman's grounds

for terminating his employment would stand or whether Crenshaw would remain employed. (A. at 408, 411, 669.) Crenshaw did not appear on the appointed date for the hearing. (A. at 669.) Norman appeared on the appointed date and waited for three hours. Crenshaw never arrived. (*Id.*)

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. (A. at 669, 671, 1510.) 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. (A. at 415, 669, 671.) Crenshaw did not respond to the early retirement offer by September 5, 2011. (A. at 416, 669, 671.) 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. (A. at 416, 670, 873.) There is no dispute that Crenshaw has never requested a hearing up through today.

ARGUMENTS

I. The Court of Appeals erred in finding that Crenshaw's appellate argument that Erskine breached the implied covenant of good faith and fair dealing was preserved.

The Court held that Crenshaw's argument on appeal—that Erskine breached the covenant of good faith and fair dealing—was properly preserved solely because Crenshaw's attorney used the phrase "it shows a lack of good faith" when opposing Erskine's motion for directed verdict—a motion that Crenshaw won—at the close of evidence at trial. (A. at 1554 n. 4.) In so doing, the Court of Appeals has set precedent not supported by the law.

A. The Court of Appeals erred in finding that Crenshaw's implied covenant of good faith and fair dealing argument, made in opposition to Erskine's directed verdict motion at the close of trial—which Crenshaw won—i.e. before Crenshaw was the losing party or aggrieved party, and which was not renewed

after Crenshaw became the aggrieved and losing party, was sufficient to preserve that argument for appeal.

"Only a party aggrieved by an order, judgment, sentence or decision may appeal." 201(b), SCACR. "An aggrieved party is one who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly on his interest . . . ." *First Union Nat'l Bank v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App. 1998) (citations omitted).

> "The *losing party* must first try to convince the lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the *losing party* generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422; 526 S.E.2d 716, 724 (2000) (emphasis added) (citations omitted). Crenshaw did not gain the right to appeal until the trial court's order granting a new trial after Erskine moved for JNOV and alternatively a new trial, i.e. when he became aggrieved by an order or judgment and thus a "losing party." However, Crenshaw made his only reference related to the implied covenant of good faith and fair dealing in contract, and the only reference relied on by the Court of Appeals to find preservation of that issue, in Erskine's directed verdict motion, which Crenshaw won. Crenshaw did not renew that argument in opposition to Erskine's JNOV motion or in his Rule 59(e) motion. Therefore, when Crenshaw made the argument he was neither the aggrieved, nor the losing, party.

Crenshaw did not raise the issue of breach of the implied duty of good faith and fair dealing in any argument in the JNOV stage, and therefore, the trial court did not consider or rule upon that argument, as required for preservation. In its Final Brief to the Court of Appeals, Erskine argued that Crenshaw did not make any mention of the implied duty of good faith and fair dealing at the JNOV phase, which included: (1) Crenshaw's response to Erskine's JNOV motion and in the

alternative motion for a new trial; (2) the hearing on Erskine's JNOV motion; and (3) Crenshaw's motion to alter or amend the order granting Erskine a new trial. The Subject Decision agrees with Erskine on this point since it cites only his one mention of a "lack of good faith" in argument on Erskine's directed verdict motion as constituting the basis for his preservation of the argument. (A. at 1554.) However, since Crenshaw was not yet an aggrieved party at that time, and did not renew, even in a conclusory fashion (despite that a conclusory fashion is insufficient) his argument regarding "a lack of good faith" in any of these proceedings, he did not preserve that argument for appeal.

B. The Court of Appeals failed to apply established preservation rules because Crenshaw's implied covenant of good faith and fair dealing argument did not meet the required specificity for the trial court to have considered it and the trial court did not rule upon that issue.

The Subject Decision states, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector." *Id.* For an issue to be sufficiently specific it must be "sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (citations omitted) (finding that the appellant's citation to policy favoring arbitration was a "general acknowledgment of a policy favoring arbitration [which] is a far cry from a specifically articulated [Federal Arbitration Act] preemption argument") *id.* at 468, 644.

Crenshaw's attorney's statement that "it shows a lack of good faith" is a far cry from a specifically articulated argument on the implied covenant of good faith and fair dealing. The "good faith" statement is buried at the end of a lengthy directed verdict motion argument that did not

discuss a lack of good faith at all (other than Crenshaw's attorney stating it in conclusory fashion) and instead, and rightly, almost singularly focused on the dispositive issue to Crenshaw's breach of contract claim—whether Crenshaw complied with the one obligation he had under the alleged contractual procedure to request a hearing on the grounds of his termination. The lengthy argument on Erskine's directed verdict motion included the trial court asking Crenshaw's attorneys some version of these questions related to this central issue: (1) whether Crenshaw was obligated to request a hearing under the alleged policy; (2) whether Crenshaw in fact requested a hearing, which Crenshaw's attorney stipulated that he did not do (A. at 766); and (3) and if he did not request a hearing how Crenshaw can avoid this breach of his own. The Court addressed these questions regarding Crenshaw's own breach no fewer than 13 times during the directed verdict argument. The trial judge took a lunch break during the directed verdict argument during which he tasked Crenshaw's attorney with answering the question ". . . why wasn't that [hearing] pursued [by Crenshaw] and if not is that a waiver." (A. at 759-60.) After the lunch break, the trial court asked these questions of Crenshaw several times, and near the end of the lengthy hearing, the trial court asked, "Y'all were alleging that the college was not following the terms of their obligations under the faculty manual. That has been y'all's case. Why do they have to follow it and in this one sentence clearly was not followed [by Crenshaw]. Why does that, how you get over that?" (A. at 764.) Crenshaw's attorney responded with the same arguments he had made multiple times before in answer to similar questions by the trial court during the directed verdict hearing, which were: (1) that the requirement that Crenshaw request the hearing was unclear; (2) they were in two stages of the dismissal process at the same time; (3) the obligation that Crenshaw request a hearing was not reasonable because he was rushed to decide whether to request the hearing; (4) Crenshaw was terminated, and then finally (5) "And so, it shows a lack of good faith, the fact that they are

jumbling these stages and give him two days to respond or three, I guess, less than three days, weekend days." (A. at 750-765.) Although the directed verdict arguments continued after that, Crenshaw did not use the term "good faith" or "bad faith" or any other term that might implicate the implied covenant of good faith and fair dealing, before, or after this one mention at the end of the long argument. (A. at 765-767.)

Crenshaw's addition of the phrase "lack of good faith" to describe the same arguments he had made during the directed verdict motion several times already without using that term, and in response to repeated questions by the trial court, and the timing of that phrase near the end of a lengthy argument in which the trial court noted its "concern" over Crenshaw's failure to request a hearing (A. at 759), was not sufficiently clear to bring into focus for the trial court that he was arguing a breach of the implied covenant of good faith and fair dealing, which is further proven by the fact that the trial court did not acknowledge, much less address, the argument during Erskine's directed verdict motion or any time thereafter. Crenshaw's off-handed mention of a "lack of good faith" is not specific enough to preserve that argument for appeal.

Even if Crenshaw's mention of "a lack of good faith" is deemed to be specific enough, it was not preserved for appellate review because it was never ruled upon by the trial court. The trial court's denial of Erskine's directed verdict motion does not qualify as a ruling because it was a ruling in Crenshaw's favor and leaves nothing for Crenshaw to appeal. The trial court made two rulings after Crenshaw's "lack of good faith" comment, both of which make plain that it never addressed the issue, and Crenshaw did not ask the trial court to do so. The trial court's first ruling was an order granting Erskine a new trial on its motion for JNOV or in the alternative for a new trial. In the hearing on Respondent's JNOV motion, Appellant did not make any mention of the term "good faith" or any other argument remotely related to the implied covenant of good faith

and fair dealing in contract. (A. at 813-820.) In granting a new trial at that same hearing, the trial court properly focused on the only breach of contract issue argued in the directed verdict and JNOV motion, which was whether Appellant breached the alleged contract by not fulfilling his obligation to request a hearing in writing. The trial judge stated:

> "I reviewed my notes of the facts, both memoranda. And I had very concerns, I mean I talked to y'all in-chambers about my concern about the lack of the hearing. The hearing was set, there was no, no communication at all back to the college. The President even testified that he went to the hearing location and sat there all morning and nothing happened. And that, those facts were not controverted in any way, they were consistent. The statement for grounds of dismissal was noticed to the employee of a hearing, let us know back if a hearing is necessary, desired. No response at all. No appearance at all. And I think that fact is missing. And I think it is appropriate that I grant a new trial as requested."

(A. at 818.) Crenshaw and Erskine both made Rule 59(e), SCRCP motions as a result of this ruling—Crenshaw's requesting the trial court reinstate the jury verdict and Erskine's for clarification of whether its JNOV motion had been denied in order to preserve that issue for appeal, if necessary. (A. at 110-12, 113-15.) Neither party addressed the implied covenant of good faith and fair dealing in their Rule 59(e) motions, particularly Crenshaw, who did not even use a term implying an argument on that issue, e.g. "good faith" or "bad faith," etc. (A. at 110-12, 113-15.)

> "[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."

Elam v. S.C. DOT, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Crenshaw's Rule 59(e) motion was the proper time for Crenshaw to argue that the breach of implied covenant of good faith and fair dealing was not considered by the trial court. By not raising it then, the Court's second relevant

ruling, its order vacating its order for a new trial and granting JNOV to Erskine, did not rule upon the implied covenant of good faith and fair dealing argument. Therefore, there is no ruling from the trial court on Crenshaw's implied covenant of good faith and fair dealing argument and it was error for this Court to consider that argument since it was not properly preserved.

Moreover, Crenshaw's failure to argue that the trial court should have ruled on his implied covenant of good faith and fair dealing argument in its Rule 59(e), SCRCP motion results in waiver of that objection as not raised timely. Issues must be raised by objection in a timely manner and failure to timely object results in a waiver of the objection. *State v. King*, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999).

C. The Court of Appeals failed to apply established preservation rules because Crenshaw's breach of the implied covenant of good faith and fair dealing argument was not part of Crenshaw's case, and instead was made for the first time on appeal.

"[A] party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with or different from that taken by him at the trial, and [. . .] the parties are restricted to the theory on which the cause was prosecuted or defended in the court below." *White v. Livingston*, 231 S.C. 301, 307, 98 S.E.2d 534, 537 (1957). The term "good faith"—much less a direct reference to the principle of the implied covenant of good faith and fair dealing—does not appear anywhere in Crenshaw's Complaint. (A. at 17-34.) Crenshaw has identified only his one mention of a "lack of good faith" during Erskine's directed verdict motion at the close of its case at trial and the Subject Decision relies only on this one mention to find the argument preserved. (A. at 1554.) The trial court did not instruct the jury on the implied covenant of good faith and fair dealing and Crenshaw did not object to the lack of that instruction. (A. at 791-808.) Crenshaw pled and tried his case on various theories of how Erskine breached the alleged contract, none of which were that its breach(es) violated the implied covenant of good faith and fair dealing. He

therefore cannot now argue that theory—much less hinge almost his entire appeal on it as he does—and it was error for the Court of Appeals to allow him to do so, and to decide the case on such an argument.

II. The Court of Appeals erred by holding that the legal issue of breach of contract was transformed to a question of fact by use of a special verdict form because this issue was not preserved since Crenshaw did not present it on appeal.

The Supreme Court of South Carolina has held "that the Court of Appeals may not decide an issue neither presented to the circuit court nor raised by proper exception on appeal." *Connolly v. People's Life Ins. Co.*, 299 S.C. 348, 352, 384 S.E.2d 738, 740 (1989) (citations omitted). "The Court of Appeals itself has recognized that issues either not raised to the trial court or by proper exception on appeal present no question for appellate determination." *Id.*; *cf. Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283, n. 3 (2003). On appeal, Crenshaw did not raise the issue of whether an unobjected-to special verdict form constitutes an agreement by the parties that the legal issue of breach of contract is thereby transformed into a question of fact. Therefore, this issue was not before, and should not have been decided by, the Court of Appeals.

In the Subject Decision the Court describes Crenshaw's special verdict form argument as, "Crenshaw asserts a jury verdict based on a special verdict form precludes a grant of JNOV." (A. at 1552.) This was the extent of Crenshaw's argument regarding the effect of the special verdict form. In response to Crenshaw's argument, the Court of Appeals correctly noted that had Crenshaw's argument been preserved it would be wrong since "our court rules and case law do not provide that the use of a special verdict form precludes the grant of JNOV." (A. at 1552.)

However, the Subject Decision finds that the trial court erred in granting Erskine JNOV because "[b]y submitting the special verdict form to the jury, without objection, the parties agreed it was a question of fact as to whether the contract was breached." (A. at 1554.) Crenshaw did

not make this argument. He argued only that use of the special verdict form in and of itself precluded a later determination of breach of contract as a matter of law. Therefore, the Court of Appeals's holding that Erskine's failure to object to the special verdict form converts breach of contract—a matter of law—to a question of fact, is beyond the issue on appeal presented by Crenshaw and thus, is error.

III. Assuming *arguendo* that Erskine breached the implied duty of good faith and fair dealing as held by the Court of Appeals, that holding is error because it directly conflicts with the Supreme Court's holding in *Swinton Creek Nursery v. Edisto Farm Credit, ACA.*

The Court of Appeals erred by holding that even if Erskine breached the implied covenant of good faith and fair dealing—which Erskine denies—that such breach is grounds for overturning the trial court's JNOV. "There exists in every contract an implied covenant of good faith and fair dealing. *Adams v. G.J. Creel and Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). However, "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). Since the implied covenant of good faith and fair dealing is not independent of the breach of contract cause of action, it is "treated . . . as merely another term of the contract at issue. . ." *Id.* And, as just another term of the contract, even if Erskine breached the implied duty of good faith and fair dealing, that breach would not excuse Crenshaw from meeting his obligations under the contract. Or, as this Court has said in the exact situation presented in this case,

> "[t]he Court of Appeals affirmed the trial court's determination that Owner could not proceed on his implied covenant of good faith and fair dealing claim because he was in default on the contract. *See Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) ('one who seeks to recover damages for 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 to perform it'). . . We conclude the Court of Appeals is correct on this point."

Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (2004). Put more succinctly, the Subject Decision's holding that Erskine breached the implied covenant of good faith and fair dealing has no impact on the outcome of Crenshaw's appeal unless it is first determined that Crenshaw did not breach the alleged contract by failing to request a hearing, which the Court of Appeals did not do. Instead, it correctly found that "Crenshaw did not request the hearing." (A. at 1550.) Indeed, Crenshaw himself admitted to not requesting the hearing multiple times at trial, and his attorney did the same during Erskine's directed verdict motion at the close of all evidence; "I agree there is no question that he didn't request it . . ." (A. at 408, 411, 669, 766.) Therefore, the Court of Appeals's holding that Crenshaw is not obligated on the contract because of Erskine's breach of the implied duty of good faith and fair dealing contradicts this Court's holding in *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (2004).

IV. The Court of Appeals erred in holding that Erskine breached the implied duty of good faith and fair dealing.

The Subject Decision holds that Erskine breached the implied covenant of good faith and fair dealing in all seven ways alleged by Crenshaw, without further explanation. (A. at 1553.) This holding is error because Erskine at all times acted reasonably in its dealings with Crenshaw, specifically including its termination of his employment. The facts show that Erskine complied with the procedures in the Faculty Manual for terminating a tenured faculty member and did so in good faith, indeed giving Crenshaw every opportunity to avoid his employment being terminated.

V. The Court of Appeals erred by contradicting its own holding in the Subject Decision, and misapplying the law, when it found that the legal issue of breach of contract was transformed to a question of fact by use of a special verdict form at trial.

The trial court was right to correct the jury's verdict and grant JNOV because breach of contract is a matter of law for the court to decide where, as here, the facts are not in dispute and where there is no evidence that reasonably supports the jury's finding. "[A]n action for breach of contract is an action at law." *Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct. App. 2000) (citing *Leahy v. Starflo Corp.*, 314 S.C. 546, 548, 431 S.E.2d 567, 568 (1993). "In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976); *conference Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct. App. 2000) (citations omitted).

The Court of Appeals erred by holding that Erskine agreed that breach of contract was a question of fact for the jury to decide when it did not object to the special verdict form. This holding is in direct conflict with the Court's correct holding in "Law/Analysis" Section I regarding the verdict form. In that section, this Court held,

> ". . . our court rules and case law do not provide that the use of a special verdict form precludes the grant of JNOV" citing to 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 question 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 . . . .").

(A. at 1552.)

Thus, by the Court of Appeals's own principled reasoning, use of a special verdict form did not preclude Erskine from moving for JNOV after its directed verdict motion was denied and the case was submitted to the jury using a special verdict form. Such a holding would render Rule

50, SCRCP inoperable every time a special verdict form is used, which the Subject Decision stated is not contemplated in "our court rules and case law." (A. at 1552.)

Therefore, use of the special verdict form, does not infringe on the trial court's right to decide an action at law, as a matter of law, on a JNOV motion. Furthermore, the trial court properly granted Erskine's JNOV motion because there is no evidence which reasonably supported the jury's finding. Crenshaw's uncontroverted testimony, as stipulated by his attorney, that he never requested a hearing on the grounds for his termination as required by the alleged contract confirm that the jury was wrong to find that Crenshaw did not breach the alleged contract, and therefore that the trial court was right to overturn the verdict and grant the JNOV. (A. at 408, 411, 669, 766.) There being no error of law in the trial court's JNOV, there can be no reversal on appeal. And, because the trial court properly found Crenshaw to have breached the alleged contract, the Court of Appeals's speculations as to why the jury may have found that Erskine breached the alleged contract are error.

VI. Because the Court of Appeals erred in holding that the use of the special verdict form transformed the issue of breach of contract from a question of law to one of fact, it consequently erred in speculating about what questions of fact the jury may have considered, and erred both by applying these speculative questions of fact to the JNOV standard and in its determination that based on these questions of fact, Erskine could not meet the JNOV standard.

The fact that use of the special verdict form does not convert breach of contract from an action at law to a question of fact for the jury to decide renders the portion of the Subject Decision regarding what the jury might have decided about the contract inapposite. (*See* A. at 1554.)

The Court of Appeals erred in finding that the jury could have found Crenshaw's obligation to request a hearing in writing to be ambiguous, when that language is unambiguous. The Subject Decision found that Crenshaw's one obligation under the contract was ambiguous through its statement that "[t]he jury as fact finders, could have found the language in the Manual and letter

were confusing as to whether Crenshaw was required to specifically request or waive a hearing that had already been set." The only document which Crenshaw alleges creates a contract is the Manual, which states (A. at 29-32.),

> "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. . . 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."

(A. at 1470.) This language is not ambiguous. It states that Crenshaw had a right to a hearing on the grounds for his termination and that if he wanted the hearing he had to notify the President in writing that he wanted the hearing. Having a right to a hearing and having to exercise that right in order to use it do not conflict with one another and are not ambiguous.

Pursuant to the Manual, the President notified Crenshaw that he had a right to a hearing, the time and place for the hearing, and that Crenshaw must request the hearing in writing not less than two weeks before the date set for the hearing. (A. at 408-09, 1365-66, 1544.) The President's letter restates this procedure by saying that Crenshaw has the right to the hearing unless he waives, i.e. he does not request it. (A. at 1366.) This reference to a waiver does not make the requirement ambiguous. If anything it helps to clarify that if Crenshaw did not request the hearing to which he was entitled, in writing, then he was deemed to have waived his right to the hearing. This meaning is straightforward. Crenshaw was required to request a hearing in order to exercise his right to it, and if he did not, then he waived the hearing. The fact that the procedure requires the hearing be scheduled has no effect on the right to the hearing and the requirement that Crenshaw request it. He has a right to a hearing. It is scheduled for a date and time. Crenshaw must exercise his right by telling the President in writing that he wants the hearing. If he doesn't, then there is no hearing.

If he does, then the hearing takes place. Crenshaw failed to follow the simple procedure of requesting a hearing and thereby waived his right to the hearing just as if he had waived his right to vote by not registering.

The Court of Appeals further erred in finding that the jury could have found that Crenshaw did not breach his obligations to Erskine because the offer of early retirement was still pending when the President sent Crenshaw his letter outlining the grounds for dismissal and still pending (for one more day) on the date of the scheduled hearing on Crenshaw's dismissal. Crenshaw's only obligation under the alleged contract was to reply to the President in writing and request a hearing. As discussed herein, Crenshaw and his attorney have admitted that he breached this obligation. (A. at 408, 411, 669, 766.) Crenshaw and Norman agreed that Crenshaw would choose one of the three options that they agreed to in their August 6th meeting by an August 8th deadline. (A. at 1346.) The Subject Decision correctly points out that Crenshaw failed to choose one of those options by the deadline he agreed to. (A. at 1550.) Once Crenshaw failed to meet that deadline the Informal Proceedings stage of the termination process ended and President Norman had every right to move into the Formal Proceedings phase, which he did on August 12, by sending Crenshaw the grounds for his dismissal. (A. at 653-54, 1365-73, 1544.) The Faculty Manual does not specify the timing for moving from Informal Proceedings to Formal Proceedings. (A. at 1469-70.) Therefore, President Norman's offer of an agreement outlining terms of Crenshaw's early retirement was after, and not a part of, the procedures and did not preclude the rest of the process from proceeding, which President Norman explained in essence to Crenshaw in their email exchanges between August 8 and August 12. (A. at 1539-1544.)

The fact that the 21-day consideration period for the agreement on terms of Crenshaw's early retirement did not expire until one day after the scheduled hearing on the grounds for

dismissal is of no import. First, as just explained, Crenshaw had already failed to choose an option for resolving the matter by the agreed-upon deadline, and the Informal Proceedings ended at that time. Second, this finding ignores that the hearing was set "subject to adjustment upon reasonable request." (A. at 1550.) All Crenshaw had to do was request that the hearing be re-scheduled, which he did not do, and the pending agreement on early retirement did not prevent him from doing that. Third, this finding ignores that President Norman extended Crenshaw's time to consider the agreement by six days (to September 5) and that Crenshaw still never responded to the offer, and that President Norman gave Crenshaw another two days after the deadline before terminating his employment on September 7. (A. at 1550.) Erskine's early retirement agreement's 21-day consideration period does not excuse Crenshaw's non-performance of his contractual obligation.

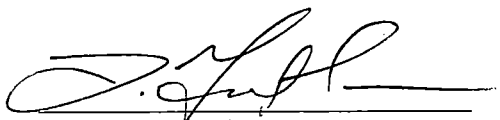
The Court of Appeals further erred by finding that a jury could have found that any breach of the alleged contract by Crenshaw was immaterial because this issue was not preserved. Crenshaw never argued the immateriality of his breach and therefore that issue was not before the Court of Appeals. *See* Section II *supra*. It was error to base any part of the Subject Decision on this unpreserved issue that was not before the Court of Appeals.

CONCLUSION

The Subject Decision misses the mark on the central, and dispositive issue, in Crenshaw's appeal—whether the trial court properly granted JNOV to Erskine because Crenshaw's admitted failure to meet his contractual obligation precluded him from enforcing the contract—by finding unpreserved issues preserved and misapprehending the law and facts. Erskine asks this Honorable Court to review the Subject Decision via issuance of a writ of certiorari to the Court of Appeals, to reverse the Subject Decision, and to affirm the circuit court's JNOV in Erskine's favor.

Respectfully submitted,

October 22, 2018



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Circuit Court Case No. 2012-CP-01-00158

Opinion No. 5571 (S.C. Ct. App. Filed June 27, 2018)
Appellate Case No. 2015-002090

William Crenshaw, Respondent,

v.

Erskine College and David Norman, Petitioners.

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I, L. Grant Close III, of FordHarrison, LLP, counsel for Erskine College and David A. Norman, hereby certify that the foregoing **PETITION FOR A WRIT OF CERTIORARI AND APPENDIX BY ERSKINE COLLEGE AND DAVID A. NORMAN,** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on October 22, 2018, properly posted for delivery to the following addressees:

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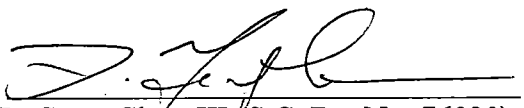
By: 
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