

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY  
Court of Common Pleas  
Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No. 2018-001926  
*Crenshaw v. Erskine College*, 424 S.C. 287 818 S.E.2d 218 (Ct. App. 2018)

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William Crenshaw, ..... Respondent,

v.

Erskine College and David Norman, ..... Petitioners.

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**RESPONSE TO PETITION FOR WRIT OF CERTIORARI**

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## **DR. CRENSHAW'S STATEMENT OF QUESTION PRESENTED**

Did the Court of Appeals correctly hold that the evidence presented at trial supported the jurors' findings of fact that (1) Dr. Crenshaw did not breach his obligation under the agreement and (2) Erskine College did breach its obligation under the agreement, thereby meaning the trial judge erred as a matter of law by granting Erskine College's motion for a judgment notwithstanding the verdict?

## **ERSKINE COLLEGE'S STATEMENT OF 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 oppositions to Erskine's directed verdict motion at the close of the trial—which Crenshaw won—i.e. before Crenshaw was the losing party or aggrieved party, was sufficient to preserve that argument?
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  - 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. Did the Court of Appeals 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 those questions of fact to the JNOV standard?

## STATEMENT OF THE CASE

This appeal is from the circuit court's order granting Defendant's motion for judgment notwithstanding the verdict and denying Plaintiff's Rule 59(e), SCRCF motion filed August 24, 2015. R. 6-8. Dr. William Crenshaw ("Dr. Crenshaw") commenced this action against Erskine College ("Erskine") and David A. Norman ("President Norman" or "Dr. Norman") by filing the summons and complaint on June 6, 2012. R. 9-26. The complaint alleged causes of action for wrongful discharge, breach of contract, and intentional infliction of emotional distress. Complaint, R. 18-26. Erskine and President Norman filed an answer that denied Dr. Crenshaw's allegations and raised several affirmative defenses. R. 27-40.

Erskine and President Norman filed a motion for summary judgment regarding all of Dr. Crenshaw's claims after the parties had engaged in extensive discovery. R. 41-76. The circuit court denied summary judgment. R. 1-3. Just prior to trial, Erskine and President Norman filed a second summary judgment motion regarding Dr. Crenshaw's wrongful discharge claim. R. 77-84. The circuit court took up this matter prior to the trial beginning on June 8, 2015. R. 117, ll. 1-19. The circuit court merged Dr. Crenshaw's breach of contract and wrongful discharge claims. R. 127, ll. 4-20.

At the close of Dr. Crenshaw's case-in-chief, Erskine and President Norman made directed verdict motions on all his claims. R. 445, ll. 12-15. The circuit court granted the motions as to President Norman in his individual capacity but denied the motions as to Erskine. R. 450, ll. 3-16; R. 456, l. 23-R. 457, l. 15. At the close of Erskine's case-in-chief, Erskine renewed its motions for directed verdict on Dr. Crenshaw's remaining claims by arguing with respect to the breach of contract claim that Erskine and Dr.

Crenshaw did not have a contract but if they did the circuit court should direct a verdict in Erskine's favor because Dr. Crenshaw violated the contract. R. 733, l.1-R. 737, l. 5. The circuit court granted Erskine a directed verdict with respect to the intentional infliction of emotional distress claim but denied the motion for the breach of contract claim. R. 741, l. 15-R. 752, l. 6.

After deliberating, the jury returned a verdict. The first question asked "Did Dr. William Crenshaw breach his obligation under the agreement?" and the jury answered, "No." The second question asked "Did Erskine College breach its obligation under the agreement?" and the jury answered, "Yes." The third question asked "Please state amount of damages, if any, sustained for this breach," and the jury answered six hundred thousand dollars (\$600,000.00). R. 4.

Following the trial, Erskine filed a motion for JNOV or in the alternative for a new trial. R. 85-91. At the conclusion of a hearing on the motion, the circuit court granted Erskine's motion for a new trial. R. 5. Each party filed a motion to alter or amend pursuant to Rule 59(e), SCRC. R. 102-107. On August 24, 2015, the circuit court issued the order granting Erskine's motion for JNOV and denying Dr. Crenshaw's motion to alter or amend. R. 6-8. After receiving notice of the order on August 27, 2015, Dr. Crenshaw served his notice of appeal on Erskine on September 22, 2015.

Dr. Crenshaw raised the following issue in the Court of Appeals:

Did the trial court judge err by granting Erskine College a judgment notwithstanding the verdict, finding that Dr. William Crenshaw breached his contractual obligation to Erskine College, even though the jurors, by special verdict form, expressly found (1) Dr. Crenshaw did not breach his obligation under the agreement and (2) Erskine College did breach its obligation under the agreement?

On February 14, 2018, the Court of Appeals convened an oral argument. On June 27, 2018, the Court of Appeals filed an opinion reversing the trial court and reinstating the jurors' verdict. *Crenshaw v. Erskine College*, 424 S.C. 287, 295, 818 S.E.2d 218, 222-23 (Ct. App. 2018). On August 10, 2018, Erskine filed a petition for rehearing. By written order dated September 20, 2018, the Court of Appeals denied Erskine's petition for rehearing.

On October 22, 2018, Erskine filed a petition for writ of *certiorari*. This response follows.

### **STATEMENT OF FACTS**

On September 24, 2011, Dr. Crenshaw taught his freshman seminar critical thinking course at 8:00 a.m. R. 222, l. 17-R. 223, l. 10. During that class, he noticed a female student nodding off, which he testified was unusual for that student. R. 223, ll. 13-20. Some other students told Dr. Crenshaw that she had fallen and suffered a head injury at lacrosse practice that morning. R. 223, l. 25-R. 224, l. 8. She fell and hit her head twice – once on the ground and once on her lacrosse stick. R. 224, ll. 10-12. Dr. Crenshaw was previously a certified paramedic, who was an EMT for 18 years. R. 229, l. 25-R. 230, l. 1. Based on his experience, he administered standard orientation tests to her to see whether she was aware of time, place, person, and events, and while she could respond to his questions her speech was abnormally slow. R. 224, ll. 13-18. Based off his observations and the account of the injury, Dr. Crenshaw called Dean Robin Agnew and requested that she call an ambulance while he stayed with the student. R. 224, l. 18-R. 225, l. 8. The Erskine Employee Resource Handbook calls for employees to call 911 when a student suffers a serious injury or illness, to stay at the scene until emergency

personnel arrives, and to notify the vice-president for student services. R. 233, l. 2-R. 234, l. 14; Employee Resource Handbook R. 821. The EMT arrived in the classroom, and took over treatment and transportation of the student to the hospital because of a closed head injury. R. 225, ll.8-19. When she exited the room on a stretcher, the student was calm. R. 226, l. 13.

After a little while, Dr. Crenshaw noticed the ambulance had not left yet so he went to tell her goodbye and good luck. R. 227, ll. 7-13. When he arrived some of Erskine College's athletic trainers were on the scene telling the student she did not have to go to the hospital despite showing symptoms of a closed head injury. R. 227, l. 22-R. 228, l. 2. The paramedic in charge then left the ambulance and asked Dr. Crenshaw to stay with the student in the back of the ambulance because she was now upset. R. 228, l. 22-R. 229, l. 2. Then Dean Brad Christie got into the back of the ambulance and told her she could refuse treatment despite him having no relationship with the student or medical training. R. 231, ll. 6-21.

Dr. Crenshaw studied English and earned his undergraduate degree from Wofford College and then his master's degree from the University of South Carolina in 1972. R. 209, ll. 12-24. At that point he went into the Army where he was stationed at Fort Sill, Oklahoma, in field artillery. R. 209, l. 24-R. 210, l. 3. He then graduated with his Ph.D. in English from the University of South Carolina and was hired as an English professor at Erskine beginning in the fall of 1976. R. 210, ll. 9-24. Dr. Crenshaw started as an assistant professor and worked his way through Erskine College's tenure process, and achieved tenure as a full professor in 1984. R. 211, l. 1-R. 212, l. 14. A tenured professor is granted due process and a set procedure for termination in the Erskine faculty

manual. Plaintiff's Exhibit No. 6, R. 815-20. In 1987, Erskine named Dr. Crenshaw the Dorn-Reeder Professor of English, which was an honor for him and provided financial relief for Erskine because this chair meant that his salary would be partially funded by an outside source. R. 212, l. 17-R. 214, l. 2.

While teaching at Erskine, Dr. Crenshaw was a member of two professional organizations for writers. R. 214, l. 11-R. 215, l. 5. He won various awards for his published works. R. 215, l. 23-R. 216, l. 4. The students and faculty at Erskine named Dr. Crenshaw teacher of the year twice, most recently in 2010. R. 216, ll. 5-19. Dr. Crenshaw was active in the Abbeville County community as he was a volunteer EMT for 18 years, served on the Abbeville hospital board for more than a decade, and served on the Abbeville school board for more than a dozen years. R. 216, l. 20-R. 217, l. 24.

Following the ambulance incident on September 24, 2010, Dr. Crenshaw and Adam Weyer, the head athletic trainer, engaged in an e-mail exchange. R. 235, ll. 6-16; Plaintiff's Exhibit No. 8, R. 822-29. Dr. Crenshaw copied Dean Agnew, Dean Christie, and college president David Norman on these emails because he felt like the policy had failed the injured student as her transportation to the hospital was delayed by the athletic trainers so he wanted to start a discussion about the policy. R. 235, l. 15-R. 236, l. 15. The efforts to start a discussion, however, did not receive any response from the administration. R. 236, ll. 15-17. Mr. Weyer accused Dr. Crenshaw of violating the athletic department's protocol by not calling an athletic trainer immediately when he noticed the student's injury but never produced a copy of that protocol despite multiple requests by Dr. Crenshaw to see it. R. 239, l. 1-R. 240, l. 3; Plaintiff's Exhibit No. 8, R. 822-29.

Mr. Weyer then filed a grievance against Dr. Crenshaw with Tracy Spires, the non-discrimination coordinator, on September 27, 2010. R. 242, ll.13-25; Plaintiff's Exhibit No. 10, R. 836-38. The grievance was co-signed by Erskine athletics director Mark Peeler. R. 244, ll. 12-16. Mr. Peeler co-signed the grievance despite having no interaction with Dr. Crenshaw throughout the process. R. 511, ll. 9-11. The grievance accused Dr. Crenshaw of violating an athletic trainer's protocol he had never seen and of pushing a woman claiming to be the student's guardian at the ambulance. R. 245, ll. 2-11; R. 246, ll. 15-21; Plaintiff's Exhibit No. 10, R.836-38. Mr. Weyer testified, though, that he was not aware of any protocol that Dr. Crenshaw violated. R. 491, ll. 15-17. Mr. Weyer made this accusation that Dr. Crenshaw pushed a woman even though he did not actually see it. R. 246, ll. 19-21. Dr. Crenshaw denied pushing the woman. R. 248, ll. 18-23. Dr. Crenshaw's version of events was corroborated by Due West police chief James Smith who was present at the ambulance and testified that the woman claiming to be the student's guardian was "irate, loud, very vociferous" and interfering with the EMT's. R. 155, ll. 5-18. Chief Smith testified that Crenshaw, on the other hand, behaved normally at the scene. R. 155, l. 21-R. 156, l. 5.

Dr. Gid Alston, the chairman of the Health and Human Performance department, which oversaw the athletic trainers, also filed a grievance against Dr. Crenshaw. R. 256, ll. 8-16. Dr. Alston's grievance accused Dr. Crenshaw of slandering athletic trainers in a public blog and in his classroom. R. 256, l. 17-R. 257, l. 4.; Plaintiff's Exhibit No. 11, R. 839-40. Dr. Crenshaw never commented on a public blog or made a comment about anyone specifically or personally. R. 257, ll. 5-9. Dr. Alston's grievance also accused Dr. Crenshaw of inferring that Erskine's athletic trainers were inept, poorly educated, and

inadequately trained. R. 258, ll. 12-15; Plaintiff's Exhibit No. 11, R. 839-40. Dr. Crenshaw never made comments to that effect. R. 259, ll. 9-13. Dr. Alston also accused Dr. Crenshaw of potentially harming the image of the athletic training department. R. 259, l. 14-R. 260, l. 7. No one ever presented any evidence to Dr. Crenshaw of harm he had caused to the image of the athletic training department. R. 260, ll. 8-11. Of the three people to file grievances against Dr. Crenshaw, only Mr. Weyer appeared at the scene of the ambulance, and he did not appear until late in the process. R. 261, l. 24-R. 262, l. 16.

Ms. Spires then sent the grievances to Dean Christie because her charge did not include the type of dispute at issue here as she dealt with issues such as sexual harassment. R. 243, l. 11-R. 244, l. 2.; R. 261, l. 22-R. 262, l. 1. Dr. Christie then forwarded the matter to the Erskine faculty grievance committee to mediate the dispute. R. 161, ll. 5-8; R. 262, l. 4-22. The committee met and discussed the grievances on October 14, 2010. R. 161, ll. 9-14. At that meeting, committee members complained that there was no institutional structure to guide the committee or any similar case to refer to. R. 163, l. 23-R. 164, l. 5. One faculty member recused herself prior to the committee meeting because she didn't believe the case should have been sent to the grievance committee to mediate. R. 164, ll. 9-14. She noted that accusations of slander were beyond the grievance committee's charge. R. 540, ll. 16-20. Dr. John Showalter, a psychology professor who taught at Erskine for 39 years, was the vice-chairman of the grievance committee and recalled the meeting as "very civil and proper" despite his concerns with the lack of institutional procedure. R. 190, l. 16-R. 191, l. 5.; R. 192, ll. 1-16; R. 517, ll. 1-4. At the meeting, the grievance committee determined it could not

formulate a workable mediation plan so it returned the grievances to Dean Christie. R. 113-18; Plaintiff's Exhibit No. 3, R. 807-08.

Dean Christie offered to mediate between the parties. R. 267, l. 13-R. 268, l. 2. He described the offer as "a conversation among peers, no electronic recordings, no lawyers, no other mediators but me." R. 268, ll. 5-7; Plaintiff's Exhibit No. 12, R. 841. Dr. Crenshaw accepted Dean Christie's offer, but the mediation did not occur because the complainants refused the offer. R. 268, ll. 8-15; R. 495, ll. 18-23; R. 512, ll. 17-23; R. 664, l. 22-R. 665, l. 2. Dean Christie then forwarded the matter to President Norman for adjudication. R. 269, ll. 9-23; Plaintiff's Exhibit No. 13, R. 842.

The first thing President Norman did was appoint an ad hoc faculty committee and created five questions for them to answer. R. 270, ll. 9-15; Plaintiff's Exhibit No. 14, R. 843-44. This six-person committee consisted of five tenured faculty members and one non-tenured faculty member. R. 272, ll. 6-10. President Norman asked the committee five multiple-choice questions to assess Dr. Crenshaw's behavior with the answer choices being "a) commendable behavior, b) compliant behavior, c) mishandled the situation, d) grossly mishandled the situation, e) handled the situation in a way that severely limits Erskine's ability to carry out its mission." R. 272, l. 23-R. 273, l. 2; Plaintiff's Exhibit No. 14, R. 843-44. The questions dealt with Dr. Crenshaw's 1) handling of an emergency situation; 2) treatment of emergency personnel including the student's emergency contact; 3) professionalism and collegiality towards other faculty at the point of crisis; 4) professionalism and collegiality in the aftermath of crisis; and 5) respect for the grievance committee and evidence of respect for faculty governance and the policies and procedures of Erskine. R. 273, ll. 2-11; Plaintiff's Exhibit No. 14, R.843-44. These

questions posed to the ad hoc committee did not contain the original grievances against Dr. Crenshaw. R. 273, ll. 19-21; R. 667, ll. 9-13. This committee did not have any procedures in place. R. 667, ll. 14-23.

In December 2010, the ad hoc committee held a meeting and requested Dr. Crenshaw's presence at the meeting. R. 278, ll. 2-11. Dr. Crenshaw gave an opening statement that stressed the need for an actual adjudicatory process that protected the rights of all parties. R. 278, l. 12-R. 279, l. 16. Dr. Crenshaw categorically denied all allegations against him and agreed to answer specific questions. R. 279, ll. 8-15. When questioned by the ad hoc committee about what procedures should be in place, Dr. Crenshaw referred the committee to a section of Erskine's employee manual that laid out a process for sexual harassment cases that allowed each side to put up evidence and be represented by a lawyer at the hearing. R. 281, ll. 4-22. The ad hoc committee did not use this procedure. R. 282, ll. 4-7. A committee member stated that their job was not to make any judgments but to gather information so the committee chairman stated the committee was postponing action until it could clarify issues regarding its charge. R. 282, ll. 9-23. In January, one member of the ad hoc committee told Dr. Crenshaw the committee had disbanded, but the chairman stated the committee was just on hold. R. 285, ll. 2-18. The ad hoc committee sent President Norman a letter dated January 4, 2011, that stated, "At this time, we believe we can do no more to help resolve the situation. It is our opinion that faculty governance will not be successful in this case; therefore, we are turning the matter back to the President's office for further action." R. 284, l. 22-R. 285, l. 3.; Plaintiff's Exhibit No. 16, R. 846-47.

Dr. Crenshaw taught during the spring semester and did not hear anything else about the matter until August 6, 2011, when President Norman requested a meeting after Dr. Crenshaw met with his freshman students for the first time. R. 287, ll. 3-17. At that meeting President Norman “said he was going to fire [Crenshaw].” R. 287, l. 14. Prior to the meeting, President Norman gave no indication to Dr. Crenshaw that termination was a possibility. R. 294, ll. 21-23. President Norman began the meeting by reading a letter that stated he was beginning termination proceedings against Crenshaw. R. 288, l. 23-R. 289, l. 2.

The Erskine faculty manual lays out requirements and a procedure to terminate a tenured professor. R. 289, ll. 7-8. To fire a tenured faculty member, the Erskine faculty manual requires adequate cause, which it defines as “personal conduct which substantially impairs the individual’s fulfillment of institutional responsibilities, personal conduct which violates the moral standards which have always been a part of the Erskine College community, or which demonstrated incompetence or dishonesty....” Erskine faculty manual p. 35. The faculty manual specifies that tenure gives a “guarantee of reasonable employment security ... to ensure academic freedom to the faculty.” R. 434, ll. 13-15; Erskine faculty manual R. 816. The manual also requires Erskine to follow a set procedure” in addition to demonstrating adequate cause,” which begins with preliminary proceedings. Erskine faculty manual R. 818. Preliminary proceedings call for the president to consult with the appropriate academic vice president to “seek to resolve the matter with the tenured faculty member in private. If the matter is not resolved by mutual consent, the President will formulate a statement describing the grounds for dismissal.” Erskine faculty manual R. 818-19. If the preliminary

proceedings do not resolve the situation, then the process moves to formal proceedings where the president must inform the tenured professor in writing of the grounds for his dismissal and schedule a hearing before a faculty committee. Erskine faculty manual, R. 819, sec. 2. The faculty member is required to reply in writing "stating whether a hearing is desired ... not less than two weeks before the date set for the hearing." Erskine faculty manual p. 36, sec. 2. The faculty manual further lays out guidelines for selecting the hearing committee and appeals. Erskine faculty manual R. 819, secs. 3-4. The manual allows for suspension "during these procedures only if immediate harm to himself or others is threatened by his continuance." Erskine faculty manual R. 819, sec. 5.

President Norman did not negotiate any matters with Dr. Crenshaw at the outset of the meeting but instead gave him three requirements to fulfill to keep his job. R. 289, ll. 16-20. President Norman also informed Dr. Crenshaw he would not be allowed to teach during the fall semester without giving any reason for the suspension. R. 289, ll. 20-25. The three requirements for keeping his job that President Norman laid out were that he must apologize to the people who filed grievances against him, the Erskine faculty, and the Erskine community. R. 290, ll. 8-20. The apology to the original complainants had to be accepted in writing by them, and the faculty apology had to be accepted by two-thirds of the faculty during a vote. R. 290, ll. 8-20. President Norman never specified what Dr. Crenshaw was required to apologize for. R. 290, l. 24-R. 291, l. 14. Late in the meeting, President Norman made an offer to Dr. Crenshaw to pay him salary during an early retirement. R. 295, ll. 3-23. President Norman initially gave Dr. Crenshaw until Monday at 5:00 p.m. to accept the offer but then left it open for twenty-one days. R. 295, l. 24-R. 296, l. 17.

Then six days later, President Norman escalated the termination process to the second stage by writing a letter to Dr. Crenshaw that notified him of his termination and the grounds thereof. R. 296, l. 25-R. 297, l. 18; Plaintiff's Exhibit No. 17, R. 848-856. The letter expressed three categories of allegations that were President Norman's grounds for dismissal: 1) the September 24 ambulance incident and its aftermath; 2) Dr. Crenshaw's behavior before the ad hoc committee; and 3) disloyalty and disparagement of Erskine and its mission. R. 297, l. 21-23; R. 299, ll. 1-4; R. 300, l. 25-R. 301, l. 4; Plaintiff's Exhibit No. 17, R. 848-56. The category one allegations that President Norman determined to be true were that Dr. Crenshaw wrongfully entered an ambulance, pushed the student's emergency contact, and improperly gave medical advice to the student despite others with more authority being present on the scene. R. 297, l. 21-R. 298, l. 24; Plaintiff's Exhibit No. 17, R. 848-56. The category two allegations that President Norman found true were that Dr. Crenshaw acted improperly before the ad hoc committee by threatening its members, leading to the resignation of one member. R. 299, ll. 1-15, 21-25; Plaintiff's Exhibit No. 17, R. 848-56. That member, Dr. Robert Elsner, did not actually resign as he signed the final resolution drafted by the committee. R. 299, ll. 16-19; R. 576, ll. 10-16. The ad hoc committee's written statement did not mention the word threat or bully. R. 576, l. 23-R. 577, l. 6. The final category of allegations President Norman based the termination on was based on a post from a closed Facebook group made up of Erskine alumni concerned with Erskine's future where Dr. Crenshaw criticized the direction Erskine was heading under President Norman's leadership. R. 300, l. 25-R. 302, l. 15; Plaintiff's Exhibit No. 17, R. 848-56. President Norman accused Dr. Crenshaw of blatant disloyalty to Erskine despite Dr. Crenshaw having donated

\$3,000.00 to Erskine that year by not claiming expense reimbursements he was entitled to. R. 303, ll. 12-24. Dr. Crenshaw made this donation because he “knew that Erskine was in trouble and needed money.” R. 304, ll. 6-7.

Dr. Crenshaw received this letter via e-mail on Friday, August 12, 2011. R. 304, ll. 13-24; R. 306, ll. 3-5. Dr. Crenshaw testified this letter was “like dropping a second bomb” because the parties were still in the preliminary proceedings with him deciding whether to accept Erskine’s offer of early retirement, and then this letter escalated the process to the second stage. R. 305, ll. 3-16. The letter set a termination hearing for August 29 at 9:00 a.m. and required Dr. Crenshaw to request the hearing in writing two weeks before the hearing, which made his response due by the following Monday at 9:00 a.m. R. 305, l. 17-R. 306, l. 2; Plaintiff’s Exhibit No. 17, 848-56. The letter also stated that Dr. Crenshaw had a right to the hearing unless he waived the hearing. R. 306, ll. 9-11. Dr. Crenshaw did not affirmatively request this already-set hearing, but he did nothing to waive the hearing either. R. 306, l. 9-11. During this time, President Norman had banned him from campus even though his house of thirty-two years was basically in the heart of campus. R. 307, ll. 11-18.

On September 7, President Norman sent Dr. Crenshaw a letter formalizing his firing. R. 307, l. 21-R. 308, l. 3; Plaintiff’s Exhibit No. 18, R. 857. President Norman gave Dr. Crenshaw until the next Friday to retrieve his personal items that he had accumulated during his more than thirty years on campus. Dr. Norman further required Dr. Crenshaw to retrieve these items during non-business hours with someone accompanying him. R. 308, ll. 4-22.

The original grievances filed against Dr. Crenshaw that started the whole process were never resolved. R. 313, ll. 4-7; R. 498, ll. 15-17; R. 513, ll. 6-8. Dr. Crenshaw “expected to be teaching for several more years” if not for the termination. R. 313, l. 18. His salary at the time of his termination was \$70,000.00 per year, and he was accruing retirement benefits, which he had to deplete after being fired. R. 317, ll. 1-19. His salary had been stuck at that level for several years because Erskine was in a salary freeze, but he expected a raise possibly as soon as the year he was fired. R. 317, l. 20-R. 318, l. 5. After being terminated, Dr. Crenshaw took out \$50,000.00 from his retirement and went on Social Security, which lowered his benefits. R. 318, l. 11-R. 319, l. 6.

#### STANDARD OF REVIEW

The Court of Appeals stated the standard of review:

When reviewing the trial court’s ruling on a directed verdict or JNOV motion, this court must apply the same standard as the trial court “by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep’t of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). Moreover, “[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). In deciding such motions, “neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.” *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000).

*Crenshaw v. Erskine College*, 424 S.C. 287, 295, 818 S.E.2d 218, 222-23 (Ct. App. 2018); *see also* Final Brief of Appellant at 18-19.

Although not identifying a standard of review, Erskine implicitly acknowledges the proper standard of review. *See, e.g.*, Petition for Writ of *Certiorari* at 21 (arguing

“there is no evidence which reasonably supported the jury’s finding.”). Erskine cannot meet this standard of review.

## ARGUMENTS

**The Court of Appeals correctly held that the evidence presented at trial supported the jurors’ findings of fact that (1) Dr. Crenshaw did not breach his obligation under the agreement and (2) Erskine College did breach its obligation under the agreement, thereby meaning the trial judge erred as a matter of law by granting Erskine College’s motion for a judgment notwithstanding the verdict.**

This question before this Court is simple: Was there any evidence presented at trial that supports the jurors’ findings that Erskine breached the contract and Dr. Crenshaw did not? If the answer to this question is “yes,” then the trial judge erred as a matter of law by granting a judgment notwithstanding the verdict. If the answer to this question is “yes,” then the Court of Appeals was correct when it reversed the trial judge and held:

The 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 jury could have also determined Crenshaw did not breach his obligations to Erskine because the offer for early retirement was still pending when Crenshaw received Norman’s letter and remained pending until the day after the scheduled hearing. Finally, even assuming the contract required a reply from Crenshaw, the jury could have determined Crenshaw’s breach was immaterial.

*Crenshaw*, 424 S.C. at 297, 818 S.E.2d at 224; *see also* Final Brief of Appellant at 21-24.

The Evidence presented at trial established the following timeline, which also revealed that Erskine College never intended to comply with its obligations to Dr. Crenshaw under the agreement:

**On August 6, 2011**, the Erskine College, through Dr. Norman, suspended Dr. Crenshaw and initiated Preliminary Proceedings for termination. Two options emerged. The first required Dr. Crenshaw to apologize to the specific faculty members involved in the grievances, the entire Erskine

faculty, and the larger Erskine Community. This option was available until **December 2011**. The second option was early retirement. Federal law required early retirement to remain open for twenty-one days.

**On August 11, 2011**, Dr. Norman confirmed in writing that that Dr. Crenshaw had twenty-one days, i.e. until **August 27, 2011**, to consider the early retirement option.

**On August 12, 2012**, Dr. Norman informed Dr. Crenshaw that Erskine College had escalated to Formal Proceedings, outlined the grounds for termination, and set the Hearing Committee for **August 29, 2011**.

Dr. Norman's letter of August 12, 2011, expressly represented to Dr. Crenshaw that the hearing would occur "unless you waive your right to a hearing." During the period from August 6 to 12, 2011, Erskine College's bad faith and unfair dealings with Dr. Crenshaw manifested itself in eight significant ways.

First, suspending Dr. Crenshaw was contrary to the Faculty Manual. According to the manual, at R. 819, "The tenured faculty member will be suspended from his position during these [termination procedures] only if immediate harm to himself or others is threatened by his continuance" (emphasis added). The record is devoid of any evidence that Dr. Crenshaw was an immediate threat to himself or others as those words are ordinarily understood. Suspending Dr. Crenshaw in this manner is evidence not only of Erskine College's breach of the agreement but also its bad faith.

Second, during the August 6<sup>th</sup> meeting, Dr. Norman did not identify any grounds for terminating Dr. Crenshaw. Dr. Norman finally set forth the supposed grounds for termination in his August 12<sup>th</sup> letter to Dr. Crenshaw. The evidence supports the jurors finding that *none* of the grounds set forth in the letter constituted just cause under the agreement. Terminating Dr. Crenshaw without just cause is evidence not only of Erskine College's breach of the agreement but also its bad faith.

Third, Erskine College did not comply with the Preliminary Proceedings provision of the Faculty Manual, at R. 818-19. Dr. Norman initially set unprecedented and impossible conditions for Dr. Crenshaw to keep his job. No Erskine College faculty member ever had been required to get two-thirds of the faculty to accept an apology. A faculty vote, in fact, never had required a two-thirds vote. Dr. Norman further required Dr. Crenshaw to apologize to the "Erskine Community," even though Dr. Norman himself could not provide a definition of the "Erskine Community." Erskine College setting these unprecedented and impossible conditions is evidence not only of Erskine College's breach of the agreement but also its bad faith.

Fourth, when the discussions turned to early retirement, Erskine College terminated the Preliminary Proceedings prior to the expiration of the twenty-one-day consideration period required by federal law for consideration of an offer of early retirement. Erskine College prematurely terminating the Preliminary Proceedings and violating federal law is evidence not only of Erskine College's breach of the agreement but also its bad faith. Based on Erskine College's handling of the Preliminary Proceedings, a reasonable jury could conclude that Erskine College was severing all ties with Dr. Crenshaw, without just cause, regardless of what it took to accomplish that objective.

Fifth, a reasonable jury could conclude that Erskine College did not comply with the Formal Proceedings, at R. 819, of the Faculty Manual. Although the Faculty Manual requires the President to fix the time and place of the Formal Proceedings, Dr. Norman further represented to Dr. Crenshaw that the hearing would take place unless he waived his right to a hearing. A reasonable jury could conclude that Dr. Crenshaw was entitled

to rely on that provision. Dr. Norman, however, did not take any steps to appoint the Faculty Hearing Committee. Not appointing the Faculty Hearing Committee is evidence not only of Erskine College's breach of the agreement but also its bad faith.

Sixth, a reasonable jury could conclude that Erskine College scheduled the Faculty Committee Hearing in such a manner that Dr. Crenshaw did not have a meaningful opportunity for a fair hearing. Dr. Norman gave Dr. Crenshaw only a weekend to respond to the August 12<sup>th</sup> letter, meaning that Dr. Crenshaw did not have an opportunity to speak to his attorney, even though the Faculty Manual contemplates the tenured faculty member having access to counsel. Scheduling the Faculty Committee Hearing in this manner is evidence not only of Erskine College's breach of the agreement but also its bad faith.

Seventh, the Formal Proceedings and Faculty Hearing Committee procedure set forth an objective standard of "allow[ing] the tenured faculty member to prepare a defense." Faculty Manual, R. 819. In his August 12<sup>th</sup> letter, Dr. Norman, informed Dr. Crenshaw, "This schedule is subject to adjustment upon reasonable request." R. 849. A reasonable jury could conclude that Dr. Norman changed the objective standard of allowing Dr. Crenshaw sufficient time to prepare a defense to Dr. Norman's subject determination of what is reasonable. A reasonable jury additionally could conclude that Dr. Norman's conduct from August 6<sup>th</sup> to August 12<sup>th</sup> demonstrated that Erskine College had no intention of providing Dr. Crenshaw with a fair Faculty Hearing Committee procedure. Scheduling the Faculty Committee Hearing in this manner is evidence not only of Erskine College's breach of the agreement but also its bad faith.

Eighth, a reasonable jury could view Dr. Norman's handling of the entire matter and determine that Erskine College breached its agreement with Dr. Crenshaw, including its obligation to deal with him in good faith.

Once this Court determines the evidence presented at trial supports the jurors' special verdicts, the inquiry ends. Dr. Crenshaw, nevertheless, will respond to the arguments made by Erskine College.

### **Response to Arguments Made by Erskine College**

#### **A. Implied Covenant of Good Faith and Fair Dealing (Erskine's Arguments I, III and IV).**

Erskine's Questions I, III, and IV essentially question whether Dr. Crenshaw preserved the issue of Erskine breaching the implied duty of good faith in their contract and whether Erskine did breach its duty of good faith. Dr. Crenshaw properly preserved the issue of whether Erskine breached the parties' contract by not acting in good faith.

The state's issue preservation rules require that an issue be raised and ruled upon by the trial court before it can be heard by the appellate courts. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing *Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). "It is axiomatic that an issue cannot be raised for the first time on appeal." *Id.* "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, \_\_\_ (2005).

As the Court of Appeals found, Dr. Crenshaw argued throughout the trial that Erskine violated the implied duty of good faith in terminating Dr. Crenshaw. (A. at 1554, n. 4.) Erskine has framed the issue as if the jury could only rely on a breach of the implied duty of good faith to find that Erskine breached its contract with Dr. Crenshaw.

The issue before the jury was not so narrow as the question presented to it was “Did Erskine College breach its obligations under the agreement?” (A. at 12.) The trial court instructed the jury regarding the applicable law of breach of contract. “A party breaches a contract when that party does not perform as agreed upon under the contract by failing to carry out a term, promise or condition of the contract.” (A. at 799.) This proper instruction gave the jury wide latitude in determining whether Erskine breached its contract with Dr. Crenshaw and how it did so. While acting in bad faith was the majority of this breach, the trial court did not limit the jury to only considering whether Erskine acted in bad faith in determining whether Erskine breached the contract.

Erskine argues that Dr. Crenshaw did not preserve the issue of Erskine’s bad faith because he raised the issue at the directed verdict stage and not the JNOV stage. At the JNOV stage, Dr. Crenshaw, who was the prevailing party at trial, properly argued that the jury verdict must stand because there was evidence in the record to support the verdict. (A. at 101-06, 110-12, 816-19.) “When considering a motion for judgment notwithstanding the verdict, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them.” *Force v. Richland Memorial Hosp.*, 322 S.C. 283, 284 471 S.E.2d 714, 715 (citing *Horry Co. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993)). Dr. Crenshaw repeatedly argued prior to trial, throughout the trial, during the post-trial motions, and during the appeal that Erskine violated the contract mainly through its bad faith actions. He properly reasserted this position during the post-trial motions stage by arguing that evidence in the record supported the jury’s verdict. The trial court rejected this argument, but the Court of

Appeals properly reversed the trial court and reinstated the jury verdict because evidence in the record supported that Erskine breached the contract with Dr. Crenshaw.

Erskine's reliance on *Swinton Creek Nursery v. Edisto Farm Credit, ACA* is misplaced. The Court of Appeals did not rule that Erskine's breach has no impact on Dr. Crenshaw's obligation to perform the contract; instead, the Court of Appeals correctly found that evidence supported the jury's finding that Dr. Crenshaw did not breach his obligation. In *Swinton Creek*, a borrower sued his lender for breaching the implied covenant of good faith in the parties' loan contract. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (2004). The Supreme Court affirmed the trial court's directed verdict in the lender's favor because the borrower could not pursue a breach of contract action when the borrower had breached the contract by going into default on the loan. *Id.* at 487, 514 S.E.2d at 135.

In the present case, Dr. Crenshaw fulfilled his contractual obligations. The verdict form asked the jury, "Did Dr. William Crenshaw breach his obligation under the agreement?" (A. at 12.) The jury answered "No." (*Id.*) The evidence in the record supported the jury's finding. Dr. Crenshaw was prepared to perform his contractual duties as a professor by teaching courses in the fall 2011 semester when Erskine suspended Dr. Crenshaw and began the termination process in August. (A. at 295, ll. 3-17; at 296, l. 23-297, l. 2; at 297, ll. 16-20; at 304, l. 25-305, l. 18; at 864-72.) He, therefore, was able, ready, and willing to perform his obligations under the contract at the time Erskine terminated him. This requirement is what a party seeking to recover damages for a breach of contract must show. *See Swinton Creek Nursery*, 334 S.C. at

487, 514 S.E.2d at 135. The *Swinton Creek Nursery* case does not support Erskine's argument that the Court of Appeals' reversal of the JNOV.

As discussed above evidence in the record supported the jury's verdict that Erskine breached its contract with Dr. Crenshaw.

**B. Special Verdict Form (Erskine's Arguments II and V).**

Erskine takes issue with the Court of Appeals observing, "By 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." *Crenshaw*, 424 S.C. at 297, 818 S.E.2d at 224; Petition for Writ of *Certiorari*, at 17 (Erskine Argument II). Erskine also argues, "The Court of Appeals erred by holding that Erskine agreed that breach of contract was a question of fact of the jury to decide when it did not object to the special verdict form." Petition for Writ of *Certiorari* at 20 (Erskine's Argument V). Erskine overlooks the trial record and the standard of review.

At the end of all the evidence, the trial court judge denied Erskine College's motion for a directed verdict reasoning, "I think there is sufficient factual questions submitted to the jury, the issues of each party performed their obligations under the terms of the faculty manual." The trial judge suggested submitting a verdict form asking, "[D]id the Defendant Erskine College, breach any obligation owed under the faculty manual?" R. 751, l. 22 – R. 752, l. 6.

After the trial judge instructed the jurors on the law, Erskine College requested the verdict form "include an additional question as to whether or not Plaintiff, well, William Crenshaw fulfilled his obligations." R. 790, ll. 19-24. See *S. Carolina Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 300, 641 S.E.2d 903, 906 (2007)

(“The trial judge has the discretion to determine how a case is submitted to the jury” including utilizing a special verdict form.”). After some discussion, the trial court judge submitted the following two questions to the jury:

1. Did Dr. William Crenshaw breach his obligation under the agreement?
2. Did Erskine College breach its obligation under the agreement?

R. 789, l. 19 – 790, l. 25; R. 4. The jury answered “no” to the first question and “yes” to the second question and found the amount of damages “sustained for this breach” by Erskine College to be \$600,000.00.

The trial court and appellate court must give great deference to the jurors’ determination because the evidence presented at trial supports those findings. “A cause of action for breach of contract seeking money damages is an action at law.”<sup>1</sup> *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007). “It is improper in a law case to submit factual issues to a jury in the form of non-binding ‘advisory interrogatories.’ A jury’s resolution of factual issues in a law case is binding on trial and appellate courts” when the verdict is supported by the evidence. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 480, 629 S.E.2d 653, 672 (2006) (evidence supported jury’s finding that publisher acted with actual malice and trial judge erred to the extent he attempted to transform jury’s verdict on liability into “advisory interrogatories”).

The trial court judge was required to view the evidence in a light most favorable to Dr. Crenshaw and deny Erskine College’s motion for a JNOV if any reasonable inferences drawn from the evidence supported the jury’s verdict. The record in this case

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<sup>1</sup> Erskine does not dispute “an action for breach of contract is an action at law.” Petition for writ of *certiorari* at 20 (citations omitted).

supports the jury's finding that Dr. Crenshaw complied with his obligations under the agreement, and Erskine College breached its obligations.

**C. Court of Appeal's Review of Trial Court Record (Erskine's Argument VI).**

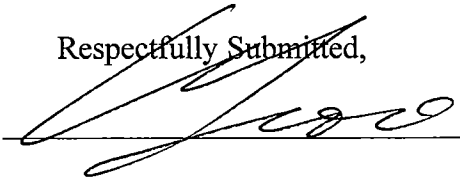
Although the trial court judge viewed the Faculty Manual as relevant to the agreement between Erskine College and Dr. Crenshaw, the court's jury instructions, without objection, allowed the jurors discretion in determining the exact terms of the agreement. R. 782, l. 13 – R. 783, l. 8. By not objecting to the special verdict form, Erskine College waived any right to complain. Rule 49, SCRCP. Under the applicable standard of review, the Court of Appeals was required to determine whether the evidence presented at trial supports the jurors' special verdicts. By following a standard of review routinely employed by appellate courts, the Court of Appeals does not engage in speculation.

**CONCLUSION**

For the foregoing reasons, the Court should deny Erskine College's petition for a writ of *certiorari*. The evidence presented at trial supported the jurors' findings that Erskine breached the contract and Dr. Crenshaw did not.

Respectfully Submitted,

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***Attorneys for Respondent William Crenshaw***

This 21<sup>st</sup> day of November, 2018.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ABBEVILLE COUNTY  
Court of Common Pleas  
Eugene C. Griffith, Jr., Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2018-001926

*Crenshaw v. Erskine College*, 424 S.C. 287 818 S.E.2d 218 (Ct. App. 2018)

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William Crenshaw, ..... Respondent,

v.

Erskine College and David Norman, ..... Petitioners.


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PROOF OF SERVICE

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I certify that I have served the Response to the Petition for a Writ of *Certiorari* by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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November 21, 2018  
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