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Date: December 3, 2018 Client-Matter Number: 513082.0004

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To:

Name:	Fax:	Phone:
Daniel Shearouse, Clerk Supreme Court of South Carolina	803-734-1499	803-734-1080

From: L. Grant Close, III Email: gclose@fordharrison.com

Phone: 864-699-1158

Re: William Crenshaw v. Erskine College and David Norman
Case No. 2018-001926

Number of Pages with Cover Page: 15	Originals Will Follow By Regular Mail

MESSAGE:

Please find enclosed as advanced notice to the Supreme Court, a copy of Erskine College and David A. Norman's Reply In Support of Petition for Writ of Certiorari filed today via U.S. postmark. Please do not hesitate to contact me with any questions.

With kind regards I remain

Very Truly Yours,

L. Grant Close, III
Attorney at Law

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S.C. SUPREME COURT

WSACTIVELLP:10222108.1

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Writer's Direct Contact:
L. GRANT CLOSE, III
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December 3, 2018

VIA: U.S. MAIL

Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211-1330

Re: William Crenshaw v. Erskine College and David Norman
Supreme Court Case No. 2018-001926
Appellate Case No. 2015-002090
Circuit Case No. 2012-CP-0100158

Dear Mr. Shearouse:

Enclosed please find the following:

1. Original and seven (7) copies of the Reply in Support of the Writ of Certiorari Petition by Erskine College and David Norman; and
2. Original and one (1) copy of the Proof of Service for same.

Please file the originals and return the file-stamped extra copy provided to me using the enclosed self-addressed stamped envelope.

With kind regards, I remain

Sincerely,

L. GRANT CLOSE III

LGC/hmr

Enclosures (all via: U.S. Mail)

cc: Robert J. Tinsley, Sr.
R. Jamison Tinsley, Jr.
E. Charles Grose, Jr.

WSACTIVELLP:10216680.1

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

Supreme Court Case No. 2018-001926

William Crenshaw, Respondent,

v.

Erskine College and David Norman, Petitioners.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BY ERSKINE COLLEGE AND DAVID NORMAN

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INDEX

INTRODUCTION

Although Erskine has comprehensively addressed all issues in its petition for writ of certiorari it will succinctly address Crenshaw's arguments made in return to its petition after a brief Introduction. Crenshaw alleges that Erskine's Faculty Manual is a contract of employment. He did not plead or argue that there is any contract of employment other than the Faculty Manual and his Return cites no such argument. (A. at 29-32.) Crenshaw's case at trial was that Erskine breached the Faculty Manual's procedures for terminating a tenured faculty member.

The Faculty Manual provisions at issue create a multi-step process for terminating the employment of a tenured faculty member. Crenshaw's actions—specifically his failure to request a hearing in which his peers would determine whether the President's grounds for terminating him were sufficient—cut the process short and prevented him from receiving protections the process was designed to give a tenured faculty member. But for Crenshaw's own failure to meet his contractual obligations, he might never have lost his job.

Distilled to its simplest form, the process for terminating a tenured faculty member is that the President must start by trying to informally resolve issues justifying termination of employment with the tenured faculty member by mutual consent. If that does not work the President must provide the grounds for termination in writing to the tenured faculty member. The tenured faculty member has a right to a hearing before a committee of other faculty members in which he can present evidence, witnesses, and have an attorney defend him. The Faculty Manual clearly states that the tenured faculty member must request the hearing in writing to the President. At the hearing, the burden to prove that the tenured faculty member must be terminated is on the President. The faculty committee then decides whether the tenured faculty member will be terminated. The tenured faculty member can appeal any adverse decision of the faculty committee to Erskine's Board of Trustees. The key to this case is that as long as the tenured faculty member

requests a hearing, his employment cannot be terminated unless the hearing committee of his peers determines the President has sufficiently proven the grounds for termination.

In his Return, Crenshaw never explicitly addresses his failure to request the hearing, or its effect on his breach of contract claim. Instead, Crenshaw focuses—just as he did in his appeal—on an argument that there was evidence to support the jury's verdict that Erskine breached the contract and that he did not breach the contract. Crenshaw repeats this argument as much as possible. He argues that since there is no evidence to support that he breached the contract, there is no evidence on which the JNOV granted to Erskine could have been based. However, the evidence on which the trial court granted the JNOV is the same evidence which Crenshaw refuses to address; Crenshaw's failure to request a hearing on the President's grounds for his termination. (A. at 1550.) Thus, when Crenshaw frames the dispositive issue as "[o]nce this Court determines the evidence presented at trial supports the jurors' special verdicts, the inquiry ends," (Return p. 20), he ignores that the purpose of a JNOV is to correct a jury's error in light of undisputed facts contrary to its verdict. *See Watson v. Suggs*, 313 S.C. 291, 294, 437 S.E.2d 172, 173 (Ct.App.1993) (internal citations omitted) ("In a law case, a jury's verdict may be reversed on appeal when the only reasonable inference to be drawn from the evidence is contrary to the factual findings implicit in the jury's verdict."). The Subject Decision found that Crenshaw did not request the hearing to protect his employment and Crenshaw has never and does not now dispute that fact. Crenshaw cannot adequately refute the JNOV for Erskine by ignoring this dispositive fact.

If the Subject Decision stands, then Crenshaw will be allowed to recover $600,000 on a contract he himself breached, if not subverted, and in the process discard over 65 years of legal precedent for the "elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or

at least that he was at the appropriate time able, ready and willing so to perform it." *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951).

Crenshaw does not respond to most of the questions presented by Erskine in its petition for writ of certiorari. For brevity, Erskine will reply only to the arguments made by Crenshaw. In doing so, Erskine does not waive or abandon any of its other questions presented, any of which would justify a petition for writ of certiorari.

POINTS IN REPLY

I. Crenshaw's argument that he raised the implied covenant of good faith and fair dealing in post-trial motions "by arguing that evidence in the record supported the jury's verdict" proves that he did not properly preserve the issue of breach of the implied covenant of good faith and fair dealing.[1]

In section A of his Return, Crenshaw intermingles his preservation argument on the implied covenant of good faith with his substantive argument on the implied covenant of good faith: that Erskine is wrong in stating that the Subject Decision conflicts with this Court's opinion in *Swinton Creek Nursery v. Edisto Farm Credit, ACA*. Erskine will address Crenshaw's arguments separately starting with his preservation argument. First, Crenshaw misapprehended the Subject Decision by stating that "[a]s the Court of Appeals found, Dr. Crenshaw argued throughout the trial that Erskine violated the implied duty of good faith in terminating Dr. Crenshaw." (Return p. 20 sec. A.) The Subject Decision did not find that Crenshaw argued the implied duty of good faith throughout the trial. Instead, the Subject Decision merely stated that Crenshaw argued on appeal that he had made the implied duty of good faith argument throughout trial. The only argument the Subject Decision relied on to find the issue of the implied covenant of good faith and fair dealing

[1] The implied covenant of good faith and fair dealing will be referred to herein as the "implied covenant of good faith" or the "implied duty of good faith."

preserved, was Crenshaw's one statement using the term "lack of good faith" made during Erskine's directed verdict motion.

> "Crenshaw asserts he argued throughout the trial and during the post-trial proceedings that Erskine violated its duty of good faith to Crenshaw. We find Crenshaw's [duty of good faith] argument preserved. While he did not explicitly cite case law regarding the implied covenant of good faith and fair dealing, Crenshaw dis assert at trial Erskine violated the duty of good faith by jumping between the stages of termination: '[I]t 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 1554 n. 4.) This part of the Subject Decision clearly states that Crenshaw's one mention of "good faith" is the only ground for finding the implied duty of good faith preserved.

Crenshaw argues that he preserved the implied covenant of good faith by arguing at trial that Erskine breached the contract through its bad faith actions, and then "reasserted this position during the post-trial motions stage by arguing that evidence in the record supported the jury's verdict." (Return at 21.) Notably, Crenshaw does not make any cite to the record to support that he argued Erskine's bad faith at trial. However, even if he had argued Erskine's bad faith at trial, by admitting in his Return that his only argument in post-trial motions was that evidence in the record supported the jury's verdict, he concedes that he did not properly preserve the issue for appeal. As thoroughly addressed in Erskine's Petition, the general argument that evidence supports the jury verdict is not sufficient to preserve the issue for appeal, because it was not specific enough, was not ruled upon by the trial court, and was not timely objected to in Crenshaw's Rule 59(e) motion. (*See* Petition pp. 10-17.) Crenshaw does not even address these specific arguments made by Erskine in its Petition, which further underscores that he did not preserve the issue, and that the Petition should be granted.

II. The Subject Decision is in direct conflict with this Court's reported decision in *Swinton Creek Nursery v. Edisto Farm Credit, ACA* and Crenshaw misapprehends Erskine's Petition argument regarding that case and its proper application to this case.

Swinton Creek held that one who is in default on a contract cannot prevail on a duty of good faith argument. *See Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (2004). Crenshaw tries to argue away the significance of *Swinton Creek* by regurgitating his argument that the jury verdict found that he did not breach the contract and that Erskine did. In so arguing, Crenshaw continues to ignore the fact that he did not perform his obligation under the contract by not requesting the hearing. He further ignores that the Subject Decision found as fact that "Crenshaw did not request a hearing." (A. at 1550.) Crenshaw cannot argue that *Swinton Creek* does not apply to this case without addressing the elephant in the room: that he undisputedly failed to comply with his contractual obligation, regardless of the fact that the jury held otherwise, because the trial court granted JNOV—as it was obligated to do—specifically based on the evidence that Crenshaw did not request the hearing.

This fact comprehensively addresses Crenshaw's first "Argument" that the trial court erred as a matter of law by granting Erskine's JNOV. (*See* Return pp. 16-20.) There, Crenshaw outlines, without any citation to the record, eight ways that Erskine allegedly violated the implied covenant of good faith. (*Id.*) However, his breach precludes the relevance of that entire argument.

Crenshaw makes mention of the fact that *Swinton Creek* did not involve an employment contract and appears to question its application to this case on that basis. However, he cites no authority for his argument, and there is none. *Swinton Creek* does not limit its holding to the same loan contracts like the one at issue in that case. And, *Swinton Creek's* holding cites *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) which calls it an "elementary principle" that one who seeks to enforce a contract must show that he has performed under the contract.

Crenshaw's argument that he did not fail to perform under the contract because he was prepared to teach courses in the impending semester at the time Erskine began the termination proceedings is a red herring. Yes, the contract is for Crenshaw's employment to teach at Erskine. But, the only provision of the contract at issue is the termination process. And, Crenshaw's only obligation under the termination process was to request a hearing. His willingness to teach is not at issue, and to insert it as evidence that he complied with his obligations, is another way to ignore the fact that he failed to request the hearing—if not to draw attention away from, or even confuse, that fact.

Crenshaw's statement that "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" is a complete misstatement of any question presented in Erskine's petition. (Return p. 20.) As stated in its petition, Erskine's argument is that although it denies breaching the implied duty of good faith, even if it did so, Crenshaw's breach of the contract precludes him from recovering for any breach by Erskine. As the Subject Decision found, "Crenshaw did not request a hearing." (A. at 1550.) According to *Swinton Creek*, this fact precludes Crenshaw from enforcing the contract regardless of whether Erskine breached the implied covenant of good faith.

III. Crenshaw's argument that the use of a special verdict form at trial precludes JNOV is in direct conflict with the Subject Decision's holding that "our court rules and case law do not provide that the use of a special verdict form precludes the grant of JNOV."

Crenshaw purports to respond to Petition arguments II and V together because both involve the Subject Decision's findings related to the special verdict form used at trial. However, Crenshaw's arguments do not actually address Erskine's arguments in question presented II. In its question presented II, Erskine argues as a procedural matter that 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. (Petition p. 17.) Erskine's simple argument is that Crenshaw only argued on appeal that the special verdict form precludes JNOV, and that he did not argue that the special verdict form transformed breach of contract (a legal question) into a question of fact for the jury. (*Id.* at 17-18.) Crenshaw's Return does not address Erskine's preservation argument from question presented II.

In its question presented V, Erskine argues as a substantive matter that the Subject Decision's holding that use of a special verdict form transformed breach of contract (a legal question) into a question of fact for the jury and that such holding is in direct conflict with the Subject Decision's holding that "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.) Crenshaw agrees with Erskine's argument that an action for breach of contract is an action at law. (Return p. 24.) And, Crenshaw does not dispute that the use of a special verdict form does not transform breach of contract into a question of fact. Therefore, Crenshaw concedes Erskine's arguments in question presented V that the use of a special verdict form in this case did not transform breach of contract into a factual question solely for the jury to decide.

Instead of countering Erskine's argument, Crenshaw defaults back to his argument that the jury's verdict was supported by the evidence at trial making JNOV improper. Again, he ignores his own breach by failure to request a hearing.

IV. The Subject Decision's speculation of facts found by the jury do not prevent Erskine from meeting the JNOV standard and Crenshaw's arguments misapprehend this crucial point.

Erskine's question presented VI argues that because breach of contract is not converted to a question of fact by use of a special verdict form, there was no reason for the Subject Decision to speculate as to why the jury may have found that Crenshaw did not breach and Erskine did. Crenshaw fails to address Erskine's argument that the special verdict form does not transform

breach of contract into a question of fact. (Return p. 25.) As stated in section III above, Crenshaw concedes that breach of contract remains an issue of law.

Erskine also argues that the Subject Decision's finding that the jury might have found Crenshaw's breach immaterial—which tacitly finds that Crenshaw did have to request the hearing—was never presented by Crenshaw and therefore was not properly before the Court of Appeals. Crenshaw does not respond to his point thereby conceding that the question of materiality of his breach should not have been addressed by the Court of Appeals.

Finally, Erskine argues that the Court of Appeals's findings of fact are not supported by the evidence, and, therefore, that JNOV was proper because the evidence only supports that Crenshaw breached the unambiguous requirement that he respond in writing that he wanted a hearing. While Crenshaw does address this point, his argument that by not objecting to the use of the special verdict form, Erskine waived its right to complain about the special verdict form, misses the point. Erskine does not complain about the use of the special verdict form. Erskine argues that the facts support that Crenshaw breached the unambiguous contract and therefore that the Subject Decision was wrong to find that the JNOV standard was not met.

CONCLUSION

For the foregoing reasons, 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,

December 3, 2018

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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William Crenshaw, Respondent,

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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 **REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 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 December 3, 2018, properly posted for delivery to the following addressees:

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Dated: 12/3/18

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